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IN THE

Supreme Court of the United States

NO. 208

ASSOCIATED STORES, INC.,
Petitioner

v.

INDUSTRIAL LOAN AND INVESTMENT COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

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OPINIONS OF THE COURTS BELOW

The Report of the Special Master containing his Findings of Fact is dated October ——, 1960 and is hereto appended. The Opinion of J. B. Craven, Jr., District Judge appears in 202 F. Supp. 251, copy of which is hereto appended. The Per Curiam opinion of the United States Court of Appeals for the Fourth Circuit is dated and filed January 24, 1964, is not yet published, but copy thereof is hereto appended.

JURISDICTIONAL GROUNDS

Jurisdiction is invoked upon the grounds that, as will be shown below, the Court of Appeals in affirming the judgment below, *per curiam*, decided the matter in conflict with decisions of other Courts of Appeal and has let stand a decision on an important question of state law in conflict with applicable and controlling state decisions. Further, the Court of appeals by its summary handling of the appeals of both parties so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. The provision of Rule 19

of the Rules of the Supreme Court and those of 28 USCA 2100 *et. seq.* support the petition and the latter reference is believed to confer jurisdiction to review the judgment in question by certiorari. By order of the Chief Justice dated April 21, 1964, time within which to petition for certiorari was extended to and including June 22, 1964.

QUESTION PRESENTED

1. Did the District Court err in failing to hold that any liability or obligation of petitioner to respondent was paid, satisfied or discharged in full with respect to any balance outstanding on any conditional sales contracts, the collection upon which was awarded to respondent by order of Gilliam, D. J., dated February 4, 1958?

2. Did the District Court err in determining that petitioner had sought equitable relief in such fashion as to mitigate the effect of the North Carolina usury law (G. S. 24-2) as applied to a portion of the unlawful interest exacted of petitioner by respondent?

STATEMENT OF CASE

This litigation was begun in the Superior Court of Wake County, North Carolina, in December 1957. In due time, by reason of diversity, it was removed to the United States District Court for the Eastern District of North Carolina, Raleigh Division. A Special Master was appointed to hear the evidence which consisted of some 2250 pages of testimony and 150 exhibits. While exceptions were filed to the Masters Report by both sides, *no* objections were filed to his Findings of Fact. Hearings were held before the District Judge who after an abortive appeal to the Court of Appeals determined the insufficiency of an earlier judgment, issued a Final Judgment in July 1963 based upon his opinion, copy of which is hereto appended, which appears in 202 F. Supp. 251. From this judgment, which with the opinion adopts the Findings of Fact of the Master, appeal was taken by *both* parties to the

Court of Appeals. Briefs were filed and argument was heard on January 21, 1964.

It is appropriate here to note that these appeals by both sides were set before a panel consisting of Haynsworth and Boreman, Circuit Judges, and Michie, District Judge. When the case was called, counsel were advised of Judge Haynsworth's illness and inability to sit. Counsel were assured by Judge Boreman that Judge Haynsworth would "read the briefs" and since the court followed the practice of tape recording the arguments he would be able to listen to the tape when he returned to duty. Counsel had little choice but to agree to proceed with arguments before the balance of the panel. On January 24, 1964, less than 3 full days after conclusion of the arguments, counsel received telegrams announcing the *per curiam* decision by the *entire* panel

It is this cavalier treatment of *two* appeals in a lengthy and complex matter which gives rise to the suggestion now that the Court of Appeals has so far departed from established judicial procedures as to warrant supervision by this Court.

This is an action to recover the penalty provided by the North Carolina Usury Statute (G. S. 24-2) by reason of usurious exactments by respondent, Industrial, of petitioner, Associated, under the terms of and pursuant to certain contracts and business arrangements begun in January, 1955, and terminated in December, 1957.

The question of whether violation of the Usury Statute occurred and unlawful interest was exacted by the respondent *does not* arise in the consideration of this petition, for that such has been determined *in favor of petitioner* by the judgment and opinion of the District Court, affirmed by the Court of Appeals, and time within which request for rehearing or petition to this Court is not now available to respondent. The question, so far as this case is concerned is decided with finality.

The Questions Presented, as stated above, on this Petition are related to the following pertinent facts set out in the Record and in the Master's Findings of Fact as they appear in the Appendix to this Petition, namely:

I

As Finding #53 of the Master's report will indicate, the hearing before Judge Gilliam prior to the issuance of the order of February 4, 1958, was held upon motions of the respondent, Industrial, and upon Industrial's request that the collection of the accounts of petitioner's customers be turned over to the respondent. The recommended award of the Master and that of the District Judge is based upon the difference between money realized by the respondent and the total amount of funds advanced to Associated with respect to these conditional sales contracts, precisely that which Associated was guaranteeing at the time of assignment of each and every contract. Judge Gilliam found Industrial "is entitled to collect and have paid direct to it all future payments on contracts which it purchased." He further found in his Finding #11 " . . . the value of said conditional sales contracts is directly affected by collection efforts and equipment servicing facilities and personnel." As to what was done by Industrial to bring about payment of the accounts turned over to it by Judge Gilliam's order, the Master found that "collections deteriorated", a finding which takes on added significance when one considers that there is no finding to indicate that collections prior to that time had been anything but substantially satisfactory. From February 4, 1958, forward the guarantor of the accounts, Associated, had no opportunity or right to protect itself as a result of the lender's (Industrial's) insistence.

II

As to the second of the questions presented, the Court will be interested in observing the exact language of plaintiff's

(Associated's) pleading which gives rise to this question. In paragraph 9 of the Complaint, after recitation that plaintiff's business depends on continuing good relations with its customers and constant contact in order to insure the integrity of the security, it is alleged:

> ". . . that for reasons bearing no relation to the rights and obligations of the parties hereto, defendant has embarked upon and now threatens to pursue the practice of confounding and confusing plaintiff's customers, few of whom have any concept or understanding of the obligations under such conditional sales contracts except the obligation to pay monthly installments; that customers pay many times at the stores; that up until the present time the only contact customers had were with representatives of the plaintiff; that defendant is now diverting from the plaintiff and receiving for its own use monthly payments from plaintiff's customers; that the action of the defendant will impair the integrity of the security, and if permitted to continue will seriously and substantially affect and damage to the point of destruction the means by which plaintiff may continue to pay its obligations."

> "10. That even though an unpaid balance of said loan or loans made by defendant to plaintiff either now due or to become due are substantially or wholly reduced and off-set by the amount now recoverable by plaintiff of the defendant under the terms of G. S. 24-2, plaintiff is entitled in equity to have its interest in said customer conditional sales contracts protected by a continuation of the practice under which the payments of said contracts have been assured as regular, prompt and certain to a substantial degree . . ."

Thereupon, the plaintiff, in its prayer for relief asked for and obtained a restraining order to stop the practice of interfering with the plaintiff's collection of the conditional sales

contracts and any other practice which might impair the security for the debt plaintiff owed defendant. (See Finding of Fact #52)

ARGUMENT

In amplification of the reasons relied on for the allowance of a Writ of Certiorari on the Questions Presented, we respectfully submit:

First

1. Did the District Court err in failing to hold that any liability or obligation of petitioner to respondent was paid, satisfied or discharged in full with respect to any balance outstanding on any conditional sales contracts, the collection upon which was awarded to respondent by order of Gilliam, D. J., dated February 4, 1958?

Our position on this point is based upon the proposition that a guarantor, such as Associated, must have the right to proceed with all vigor to collect from his customers. Otherwise, the lender can take the security, as did Industrial, sit back without spending money or effort on collection and look to the guarantor whose hands were tied from protecting himself at the lender's (Industrial's) insistence. All of this could have been done in protection of everyone's rights by proper order had not Industrial insisted on having its cake and eating it too. Industrial clearly had no intention of engaging in a vigorous, or even normal, collection program and these contracts obviously could not and would not yield anything like their face value.

Precisely, in line with this position taken by petitioner is the case of *Rand v. Gillette* (1930), 199 N.C. 462, 154 S.E. 746, where there was a civil action to restrain the defendant from foreclosing certain mortgages or deeds of trust on the ground that the debts secured thereby have been fully paid and satisfied. It appeared that in a similar prior action brought by a judgment creditors of the plaintiff there was

their allegation that the instruments were not bona fide encumbrances but that they had been paid. The plaintiff in the subsequent action was a party in that proceeding and filed an affidavit denying the allegations of the complaint. The court then permitted the present defendant to foreclose the mortgages according to law.

The plaintiff now brings his action and makes the same contention that was made by his judgment creditor in the former suit.

The court held as follows:

"The judgment must be affirmed on authority of what was said in *Distributing Company v. Carraway*, 196 N.C. 58, 144 S.E. 535. A party is not permitted to take a position in a subsequent judicial proceeding, which conflicts with a position taken by him in a former judicial proceeding, when the latter position disadvantages his adversary. *Hardison v. Everette*, 192 N.C. 371, 135 S.E. 288.

"The plaintiff is face to face with the lesson, taught every day in the school of experience, that he cannot safely 'run with the hare and hunt with the hound'. He induced the court to adjudge the instruments in suit as valid and subsisting liens in 1929. If this were erroneous, as he now alleges, he has no one to blame but himself.

"The plaintiff may have his remedy at law, but equity having heard him once will not listen to him now in reversal of his former position on the same subject. The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of man. It requires that one should do unto others as in equity and good conscience he would have them do unto him, if their positions were reversed. *Bodie v. Bond*, 154 N.C. 359, 70 S.E. 824. Its compulsion is one of fair play. *Sugg v. Credit Corporation*, 196 N.C. 97, 144 S.E. 554."

Estoppel rests largely upon injury or prejudice to the rights of him who asserts it. See note in 19 Am. Jur. 728 et seq. for a full treatment on the subject.

The position taken by the one against whom the estoppel is asserted need not be acted upon by the other party but by the *court*, if his adversary is prejudiced. *Bizzel v. Auto Tire Equipment Company*, 182 N.C. 98, 103, 108 S.E. 439.

The law in North Carolina to this effect seems well settled as is illustrated in the holdings of the court in the following significant cases: *Kanupp v. Land*, 248 N.C. 203, 206; *Owens v. Voncannon*, 252 N.C. 461; *Roberts v. Grogan*, 222 N.C. 30, 21 S.E. 2d 30; *Long v. Traniham*, 226 N.C. 510, 39 S.E. 2d 384; *Hylton v. Mount Airy*, 227 N.C. 622, 44 S.E. 2d 51; and *Ingram v. Power Company*, 181 N.C. 359, 107 S.E. 209.

To the same effect is *Chandler v. McKerral*, 68 F. 2d 343, 346.

Attention also is invited to *Commercial Credit Company v. Eisenhour*, 28 Ariz. 112, 236 P. 126, 41 A.L.R. 1274, and a full discussion of the subject may also be found in 31 C.J.S. 372 et seq.

Of course, it should also be pointed out that upon the entry of the order of February 4, 1958, Associated manifestly could not appeal or do anything but sit back and take it. Industrial, relying on the guarantee extracted from plaintiff, did nothing but sit back and watch the petitioner squirm.

Judge Gilliam's order of February 4, 1958, left Associated in the position of being a guarantor who had neither access to the security for his obligation nor opportunity to protect himself and provide for means of satisfying the guarantee. This whole business arrangement depended upon constant customer attention. There is no situation in the laws of Banking, or of Bills and Notes or of Credit that we are aware of where one who endorses an obligation with re-

course or otherwise guarantees its payment is not permitted to use all reasonable means at law to save himself harmless. To hold now that Associated must pay Industrial and sweep up the dregs of conditional sales contracts which have been permitted to go sour over the years is plainly offensive to all rules of business relationship and simple justice.

Industrial's lone representative in North Carolina, Mr. Zimmerman, summed up Industrial's attitude towards the matter of collecting on this security by testifying "We do not have the knowledge, manpower or money" to work these accounts.

In conclusion, if Industrial's collection efforts had really been vigorous and effective, there would have been *no* basis for an outstanding balance with respect to which the Master found that Industrial was entitled to recover from Associated. As it was, the Court can see from the "Final Judgment" of August 20, 1963 that of accounts turned over to it by Judge Gilliam's order of February 4, 1958 totalling in excess of $350,000.00, Industrial had collected *only* the sum of $162,330.38. (Finding of Fact No. 2(d)). Associated may have been slow in making remittances to Industrial, but certainly its record of collection, as shown by the Master's findings, was good enough to exceed those of Industrial by the proverbial "country mile." (See Finding of Fact #76)

Second

2. Did the District Court err in determining that petitioner had sought equitable relief in such fashion as to mitigate the effect of the North Carolina usury law (G. S. 24-2) as applied to a portion of the unlawful interest exacted of petitioner by respondent?

Industrial contends that by asking equitable relief as set out in its complaint and prayer for referred to above, Associated had been precluded from its right under the Usury Statute (G. S. 24-2) to recover the penalty for usury

exacted and that Industrial was entitled to be paid simple interest on certain outstanding balances advanced to Associated.

Associated contends that its complaint can be interpretated as stating two causes of action, one at law and one in equity. At law, Associated asks for penalty under G. S. 24-2 for all usurious interest paid, reserved or received by Industrial. In equity, Associated asks that Industrial be restrained from interfering with its collections. It is elementary that causes arising between parties, both at law and in equity, or mixed, may be joined in a single action. G. S. 1-123. Thus, Associated has alleged separate and distinct causes of action which do not depend, one upon the other, for their vitality.

Associated *seeks no equitable relief with respect to the indebtedness upon which usury was charged.* As the long line of cases in North Carolina will disclose, this is an ever present ingredient where the equitable maxim is employed.

Even if the court should determine that there was equitable relief prayed for in one of the series of transactions, certainly the loans under the 1955 contract were paid. No equitable relief could possibly attach to this series of closed transactions, and the Special Master and the District Court below so held. The same argument is urged on the court as to all fully paid loans under the second contract. Would the court require plaintiff to bring a bill in equity to restrain defendant from interfering with its collections and a separate suit at law under G.S. 24-2 in the face of G.S. 1-123? The court will observe in the cases cited below that the law taken most favorably for the defendant has *never* imposed the equitable maxim except where loans were outstanding. The main relief prayed for in those actions was equitable remedy to prevent foreclosure of property, not for usurious penalty. Our case is obviously different as we shall point out later.

Associated further contends that the court should con-

sider that the equitable relief prayed for by Associated was eliminated from this action on motion of Industrial and prior to any consideration of the merits of this action. Associated contends that the District Court considered the equitable relief prayed for as a separate and distinct matter and one which it could eliminate as a matter of law under the terms of the contract between the parties. The court did not say: "You must tender principal and legal interest before it could consider equitable relief." No, the court considered the answer, cross-claim and motion of defendant asking that injunction granted to plaintiff be dissolved as, under covering contract, Industrial was entitled to collect money direct from customers. There is no allegation in defendant's pleadings with regard to equitable maxims. Industrial's pleadings ask primarily for a money judgment against Associated upon a cross-claim and for an accounting to determine such amounts as may be due. This is where the equity jurisdiction may have been invoked after dissolution of restraining order on motion of Industrial and without appeal by Associated. Or possibly it was invoked when Industrial sought equitable relief by motion to restrain Associated from collecting accounts and turning same over to defendant. The order on defendant's motion for equitable relief was granted and is in force even now.

On this point, the only issue raised by the petitioner which is before the Court, is its claim in law under G.S. 24-2 for penalties for usurious interest charged, received or reserved by Industrial and the issue raised by its reply to counterclaim for off-sets.

The plaintiff now seeks no equitable relief. The equitable maxim "he who seeks equity must do equity" does not apply to Associated's action in its present posture, nor in the form presented to the Special Master.

We also would ask the court not to lose sight of the fact that the equity which Associated sought was to have Industrial

stop interfering with its *collections, not* to affect in any manner the payment of Associated's obligation to Industrial. Industrial, without demand or notice to Associated, wrote a letter to all of Associated's customers advising them to pay direct to Industrial and that Associated *no longer had any interest in the accounts.* Certainly Industrial should not be allowed to take advantage of the position into which they forced Associated. Defendant's own exhibits clearly reflected the loss Associated has suffered by virtue of Industrial taking over the collection of the loans on its own motion. (See Finding of Fact No. 54.) For instance, the Record will show Industrial repossessed machines whose balance on contracts from Associated to Industrial (not full customer balance) was $77,000 and credited Associated with $20,000, thus claiming Associated should pay them $57,000; that Industrial settled with customers $24,000 in accounts for $10,000 thus alleging on accounts they took over that Associated owes them $14,000; and that they sold repossessions that represented $32,000 in loans from Associated to Industrial for $8,600 and thus Associated owes them $24,000. Or, on paper that Industrial petitioned court for permission to collect, over the prayer of Associated, Industrial now seeks recovery of some $95,000.00. This is an enormous amount, which clearly reflects that the proper collecting agent, should equity have hindsight, would have been Associated. However, equity took the parties as they were, and decided the issue against Associated and for Industrial and there was no appeal from this decision of the District Court. Industrial wrote to the customers; Associated asked that it be enjoined; Industrial countered that it be allowed to take over; the court agreed with Industrial and disallowed Associated's request. Should Industrial be allowed now to take advantage of this situation on Associated's claim for usury?

Assuming that plaintiff should fall within the maxim — that the separable causes of action should be considered

proceeding"—"must pay debt and interest" before asking for injunction. Here, Associated had paid debt for which it asked usury penalty. It did not ask equity to enjoin lender from collecting debt by foreclosure, but merely to allow borrower to collect on individual notes as to do otherwise would destroy value of notes. Defendant replied, under law, that under the contract they had a right to take over notes. The court has ruled as a matter of law under the contract, they had a right to take over contracts. The Court ruled this on defendant's motion *prior* to reference to a master. This point was then out of this suit. Master had only the following issues:

1. Associated claim for penalty of twice amount of all usurious interest paid.

2. Accounting between parties under defendant's counterclaim. This involves:

(a) Amounts loaned

(b) Amounts repaid

(c) Interest charged or reserved which must be forfeited under law if usurious. This is interest not paid. Law requires forfeiture. All such interest is forfeited, not just excess above legal rate as equity compels when debtor asks to enjoin property foreclosure.

(d) Amounts now due or owing by either party under executory contracts.

It was said in 19 Am. Jur. 275, "the maxim applies to debtor who comes into equity to restrain *sale* of security. To enforce payment he must do equity and pay amount and legal interest."

But how can this doctrine extend to a mere action for debt when an incidental prayer to restrain defendant from interfering with customers—*not to extinguish debt or to*

turn over security nor even to restrain sale of security? Industrial did not threaten to sell security and Associated did not seek to restrain any possible sale.

It is well settled that borrower must interpose defense of usury when suit is brought in equity before final decree. If he fails to do so, he cannot thereafter open decree for that purpose, since usury as a defense is not distinguishable from others in respect to the time it must be made.

Certainly the law would not require nor invite multiplicity of actions, one for usury and a separate one to restrain interference from collections growing out of same transactions. And, even if joined in one proceeding, they retain their identity as separate causes as they are pleaded separately.

Deduction of interest from face of note is an exaction of usury under statute—91 CJS 752. Recovery should be on all interest actually paid. 91 CJS 753. Placing to credit of borrower proceeds of note discounted as usurious rate constitutes such payment of usury as will subject the bank to payment of penalty fixed by law. A note of a third party accepted in settlement of usurious debt is sufficient to raise penalty. 91 CJS 753. Also, it should be kept in mind that usury statute is clear—and this is the law, it is not to be vitiated by equity—that when usurious interest is paid, two times the entire interest paid may be recovered in an action in the nature of a debt. *But*, if interest has *not* been paid, then the *entire* interest charged or reserved is forfeited. Thus, the law makes it impossible for lender to recover any interest if usurious. As the court said in *Bank v. Jones*, 205 N.C. 649:

> "Under the law in this State, a note executed and delivered as evidence of the promise of the maker to pay to the payee or his order a sum of money which has been loaned by the payee to the maker, is not void, although the payee has, knowingly, taken, received, re-

served or charged interest on the note at a greater rate than six per cent per annum, which is the legal rate in this State; only the promise, in such case, to pay interest is void. C.S., 2306.

"For this reason, the payee in an action to recover on a note on which he has charged or received usury, may recover the principal of said note only. In such cases, the entire interest is forfeited. The promise to pay such interest is void and will not be enforced by the court. Ward v. Sugg, 113 N.C. 489; 18 S.E., 717."

Plaintiff should not be deprived of its legal rights because a part of relief asked for lies in equity upon ground that it does not come into court with clean hands. *Trust Co. v. Realty*, 215 N.C. 527.

See *Moore v. Beaman*, 112 N.C. 432
Smith v. Building and Loan, 119 N.C. 249
Churchill v. Turnage, 122 N.C. 426
Cheek v. Asso. 127 N.C. 121
Ward v. Sugg, 113 N.C. 489.

An article in the North Carolina Law Review, 12 NCL 279, discusses this exception to the usury statute in connection with *Mfg. Co. v. Wilson*, 205 N.C. 493. ". . . In short, it seems the court is ever ready to inflict penalty upon one who attempts to extract more than 6% interest. In contrast with this strict policy there exists a situation in North Carolina by which a creditor may collect legal interest on a usurious loan and thus evade the penalty prescribed by the statute." *Sloan v. Piedmont*, 189 N.C. 690.

"Historically there seems no justification for the inconsistency. Until 1866 a usurious contract was totally void. It was in order to avoid effect of such a severe penalty that a rule was developed holding the statute inapplicable when debtor sought affirmative relief. (Taylor v. Smith, 9 N.C. 465; Ballinger v. Edwards, 39 N.C. 449.) The act of 1866 reduced the penalty ap-

plied whether the action was 'at law or in equity'. Justice Clark in an excellent dissent, (Churchill v. Turnage, 122 N.C. 426), has pointed out that it was not until the old line of cases had been followed that the attention of the court was called to the fact that this act was apparently intended to alter the rule that to entitle a debtor to affirmative relief he must pay legal interest. The acts of 1876-77 and of 1895 contained the provision that the charging of a usurious rate caused a forfeiture of all interest. If the obligation were usurious, there is no legal interest under these statutes. By this time, however, the old rule was too well established to be abrogated although several attempts were made to do so." (Ward v. Sugg, 113 N.C. 489; Moore v. Beaman, 112 N.C. 558; Churchill v. Turnage, 122 N.C. 426 (dissent); Owens v. Wright, 161 N.C. 127 (dissent) Casey v. Hooker, 171 N.C. 229 (dissent).

"The maxim of 'he who seeks equity must do equity' has been applied in other states to effect the same result as is reached in North Carolina. In New York, Alabama and Virginia the rule has been changed by statute so as to relieve the debtor from having to pay interest on a usurious loan under any conditions."

Thus, Associated contends that the application of equitable maxim is limited to the facts of the particular cases in North Carolina, i. e., where full payment and interest has not been tendered and debtor seeks to enjoin the sale of his security pledged and asks for incidental credit for usurious interest charged but not paid.

Moore v. Beaman, supra, Ward v. Sugg, supra, and *Smith v. B. & L., supra,* have not been overruled. Any modification must be strictly construed. The usury statute contains *no* exceptions. The legislature requires that the courts carry out its intent even if they disagree with it.

Associated relies heavily on the cases of *Bundy v. C. C. C.*, 198 N.C. 339, 200 N.C. 511 and 202 N.C. 604. These cases were almost exactly in point with the instant action. Despite the fact that this case went to the Supreme Court of North Carolina three times, after the court had allowed injunction turning accounts over for collection to plaintiff by consent, the equitable maxim was never mentioned as a defense nor by the court's own motion. The same thing is true of *Milana v. Credit Discount Co.*, 27 Cal. 2d 335, 165 ALR 621.

In the first *Bundy* Case, 198 N.C. 339, plaintiff was receiver for lumber company.. Plaintiff alleged lumber company owned accounts with amounts due it of $13,000. Defendant had filed with receiver claim for $12,000, claimed to be owner of accounts and demanded payment to it and not to receiver.

Plaintiff said because of conflicting demands on customers there might be delay and loss.

Defendant in answer admits it claims to be owner of accounts. It admits notice to debtors to pay same to defendant. Praver restraining order be levied as not title to accounts in receiver.

Consent order was entered on April 2, 1929 and plaintiff's ordered to collect accounts.

On August 22, 1929 plaintiff amended complaint which referred to dealings of parties under written contract. Plaintiff said contract had been used as subterfuge to collect usurious interest and prayer for full determination of rights of parties and an accounting of all transactions under contract, claiming usury was collected in amount of $9,900 and under C.S., 2306, demanded judgment for $19,800. Defendant demurred on grounds that several causes of action improperly united and failure to state sufficient facts to constitute cause of action.

The Court in a per curiam opinion said:

> "The case presents a controversy over a question of procedure, but when we go to the heart of the matter, it would seem to be controlled by the second proposition laid down in Waters v. Garis, 188 N.C., at p. 310, as follows: 'Second. In any action brought by the creditor to recover upon any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set-off, the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged.'
>
> "The gravamen of plaintiff's first complaint was to collect sundry accounts, as delay and controversy would entail great loss. Defendant set up the contract by which it claimed these sundry accounts. Plaintiff's amended complaint pleaded usury as a counterclaim or set-off, and demanded the penalty under the usury statute.
>
> "We think the amended complaint states facts sufficient to constitute a cause of action, and there is no misjoinder of causes of action. We will not discuss this phase, as the case goes back for trial. The judgment below is
>
> "Reversed."

In the second *Bundy Case*, *Bundy v. Comm. Cred. Co.*, 200 N.C. 511, the court generally sets out the facts of the first case with some elaboration. Briefly, complaint sought injunction; defendant filed answer setting up contract and asserting ownership of accounts; plaintiff amended complaint alleging usury at interest rate of approximately 15 per cent.

The court spends a great deal of time relative to the applicability of North Carolina or Maryland law to the contract.

In the third *Bundy* case, 202 N.C. 604, the Court again reviewed the facts and refused to upset the jury's determination of the issues. However, when reviewing the question of who should pay the costs, the court said:

> ". . . This Court held in Patterson v. Ramsey, 136 N.C., 561, 48 S.E., 811, that 'in order to determine who should pay the costs, we must consider the general result and inquire as to who has, in the view of the law, succeeded in the action'. *The action was originally instituted to restrain the defendant from collecting certain accounts. The defendant filed an answer asserting a right to collect by virtue of a written contract. Thereupon the plaintiff sought to recover the penalty prescribed by law for usurious loans. As the case developed, the allegations of usury raised the real controversy and issue between the parties.* The verdict of the jury has declared the defendant to be the winner in the contest, and, therefore, the costs follow the judgment, and the trial judge correctly taxed the costs against the plaintiff." (Emphasis added)

It is certainly ironic that when creditor seeks equitable relief in part his claim is not defeated by the same equitable maxim. Certainly this is additional reason to restrict the application of the maxim. Pomeroy 4th Ed. at page 937 is relied on for the general equitable maxim. However, Pomeroy's 5th edition at page 70 has this to say:

> ". . . And it is ordinarily the rule that a suit brought under a statute permitting the person who has paid excessive interest to recover a penalty is *not* governed by equity rules." 53 ALR 725

> "Rule (requiring payment) extends to all cases where a party seeks to have a contract set aside and cancelled on the ground of its illegality in violating the provision of some statute . . ."

Associated sued, debt not *due,* for usurious interest paid. We question whether Industrial had any right of action for debt or accounting unless debt was delinquent, notice given, etc. But, when Industrial chose the forum to assert their claims, we had a right to assert all defenses in same action. Usury does not accelerate payment of principal. Forfeiture is required when debt is sued upon and usurious interest contracted for.

Another reason for assuming that use of equitable maxim is restrictive is the case of *Pinnix v. Casualty Co.,* 214 N.C. 760. Here, Court finally overruled earlier decisions of *Wilson v. Trust Co.,* 200 N.C. 788, and said junior lien holder *could ask for injunction and have usurious interest forfeited.*

Associated is convinced that North Carolina courts have not imposed the equitable maxim to the point that usury statute is practically a nullity. Thus, in order to avoid usury, all one has to do is secure a deed of trust and bring foreclosure proceeding, which will force borrower to pay note and 6 per cent interest and bring equitable proceeding to restrain foreclosure. *Or,* if lender could force debtor into court on any *equitable* ground, he immediately by-passes usury statute.

Associated urges that two North Carolina cases clearly reflect this attitude of the court. The first is *Cuthbertson v. Bank,* 170 N.C. 531.

The court said:

> "There is nothing in this case upon which to apply that principle. In the cases cited it will be found that the plaintiffs were seeking aid of a court of equity to enjoin the foreclosure of a mortgage or to grant other equitable relief. These plaintiffs do not seek the interposition of equity in their behalf. They are suing at law 'in an action in the nature of an action for defendant', as provided in the statute for a statutory penalty."

And, in *Trust Co. v. Realty Co.*, 215 N.C. 526, the facts were that plaintiff brought action to set aside conveyances of defendant alleged to have been fraudulently made in attempt to defeat plaintiff-creditor's debt. Prayer asks that co-defendants who received deeds of trust make an accounting for funds or stocks received and be enjoined from selling property.

Defendants admitted conveyances and amounts, denied fraud invading plaintiff's rights. In further defense *defendant "charges that the indebtedness to the plaintiff was brought about by a fraudulent scheme of the plaintiff to avoid loss upon other loans, and should not, in equity, be collected, and pleads that its officers acted ultra vices in executing notes and deed of trust securing them."* (Emphasis added)

Defendants further allege plaintiff received moneys through advancements to Lambeth Company under foregoing conditions of which plaintiff had benefit and *should be estopped* from attacking validity of deed of trust.

Defendants later amended answers and set up a charge of usury against plaintiff with respect to entire loan secured by deed of trust, and notes evidencing same, reciting particulars thereof. Defendants demanded forfeiture of all interest on notes and denial of equitable relief upon ground that notes upon which right of action is based are tainted with usury.

Plaintiff demurred to these affirmative pleas upon the ground that defendants had made no tender to plaintiff of amount due, with lawful interest, as required by law.

The Court said:

> *"The forfeiture of all interest is one of the law; and only when the debtor must resort to equity to restrain collection of the usurious debt or prevent foreclosure of the mortgage security, thereby becoming,*

both in the real and technical sense, actor, is it required that he tender the amount of the debt with legal interest. When attacked, he may defend according to the terms of the statute. Noland v. Osborne, 177 N.C. 14, 97 S.E., 714; Gore v. Lewis, 109 N.C., 539, 13 S.E., 909, and cited cases; Arrington v. Goodrich, 95 N.C., 462.

"As to the defendant Lambeth Corporation, it has asked no equitable relief against plaintiff except cancellation of the debt on account of an alleged fraud; *it has not asked that plaintiff be restrained from foreclosing its deed of trust or the enforcement of its notes,* if it cannot maintain itself on the issue of fraud.

"The defense presented to the usury charge is a legal defense. The mere fact that plaintiff has brought an action involving incidental equitable features, thus choosing, as it had the right to do, the atmosphere of the proceeding, does not necessarily invest defendant's assertion of a legal statutory right with the character of an equitable claim, independently pursued.

The plaintiff will not be debarred of its legal rights because a part of the relief demanded lies in equity, upon the ground that it 'does not come into court with clean hands.' Pomeroy Equity Jurisprudence, 4th Ed., section 937; Bank v. Lutterloh, 81 N.C., 144; Pinnix v. Casualty Co., supra."

Lastly, in *Clark v. Henrietta Mills,* 219 N.C. 6, the Court held:

"Essentially this action sounds in contract. Plaintiff invokes injunctive relief *merely as an ancillary remedy incident to her main cause of action to preserve and enforce her rights.*"

The maxim "He who seeks equity must do equity" is not applicable to this case and cannot be used to bar plaintiff's right to the relief sought.

If the contention of respondent is correct, the Usury Statute is a nullity and can be abused at will by those skillful in the art of provoking a necessity for a restraining order despite the fact that it is not connected with the usurious loan transaction between the parties.

WHEREFORE, petitioner, Associated, prays that the Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to the end that the matter be reviewed upon the Questions here presented and Associated's rights under law be not swept away contrary to reliable and controlling precedent.

Respectfully,

J. C. B. Ehringhaus, Jr.
Attorney for Petitioner
P. O. Box 1776
Raleigh, N. C.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

Civil No. 1089

ASSOCIATED STORES, INC., PLAINTIFF

vs.

INDUSTRIAL LOAN AND INVESTMENT COMPANY, DEFENDANT

Report of Special Master

By order entered under date of August 22, 1958 by Honorable Edwin M. Stanley, United States District Judge, the above-entitled cause was referred to the undersigned Special Master to take the testimony and report his findings of fact and conclusion of law.

Pursuant to said order this cause came on for hearing, by agreement of counsel for plaintiff and counsel for defendant, in the Federal Courtroom in Raleigh, North Carolina, on December 8, 1958 at 10:00 o'clock a.m. Present at said hearing were the plaintiff's counsel, Messrs. Ehringhaus & Ellis, Attorneys, of Raleigh, North Carolina, and the defendant's counsel, Messrs. Howard E. Manning and John Hall Manning, of the firm of Manning & Fulton, Attorneys of Raleigh, North Carolina.

The testimony offered by both parties, consisting both of oral testimony and exhibits, was voluminous. By consent of counsel for both parties, the hearing was recessed from time to time. The actual hearings consumed twenty-five

day's time. The record covers 2,250 pages of testimony and in addition plaintiff introduced sixty-eight exhibits and defendant one hundred sixty-two. Many of the exhibits were detailed tabulations of figures, covering in the case of some individual exhibits as many as sixty-five pages in one exhibit.

At the inception of the hearing, by stipulation of counsel, for both parties, it was agreed that rulings by the Special Master on all motions, objections and exceptions of counsel would be deferred until the filing of the report of the Special Master, and that each party reserves an exception to all adverse rulings of the Special Master. Accordingly in every instance the motion, objection or exception was noted in the record and the challenged evidence was entered in the record, with all rulings by the Special Master deferred pursuant to the stipulation. It was further stipulated by counsel for both parties that each objection to evidence would likewise be treated as an exception and motion to strike the evidence to which the objection was directed.

Motions, objections and exceptions were entered by counsel in approximately 1,300 instances. Rulings thereon are entered in schedule A of this report which is attached hereto and made a part of this report.

Following the conclusion of the hearings the parties filed proposed findings of fact and conclusions of law. Briefs were also filed by both parties. The tentative findings and conclusions of the Special Master were submitted to counsel for both parties and both parties were heard thereon. Supplemental briefs were likewise submitted by both parties.

The evidence taken, with the accompanying exhibits, are transmitted under separate cover, the parties hereto having agreed by stipulation to waive any formalities with respect to the signing of the testimony.

The undersigned Special Master has carefully considered the evidence and the briefs of counsel, and submits the following findings of fact and conclusions of law:

1. The plaintiff, Associated Stores, Inc. (hereinafter called "Associated") was incorporated under the laws of South Carolina prior to January 1955. It was domesticated in North Carolina on October 2, 1956. Irving Kaye, a citizen and resident of Raleigh, North Carolina, is president of the plaintiff corporation and its principal executive managing officer.

2. The defendant, Industrial Loan and Investment Company (hereinafter called "Industrial") was incorporated under the laws of Nebraska with its principal office in Omaha, Nebraska. Its business was conducted under the supervision of the Banking Department of the State of Nebraska.

3. For sometime prior and subsequent to January 1955, Irving Kaye and Nathan Legend were associated as partners, trading under the firm name of Best SewVac, conducting in Kansas City, Kansas, a business similar to that of Associated Stores, Inc.

4. In 1954 Kaye and Legend became associated with the plaintiff and acquired a stock interest in it, as a result of which all of the capital stock of Associated was owned equally by Kaye, Legend and Louis Schifiman. This ownership continued until this hearing.

5. At the time of the above transaction, Industrial had been handling commercial paper for Best SewVac, and Kaye knew the personnel of Industrial.

6. Before acquiring stock in Associated, Kaye and Legend went to South Carolina and examined the books and records of Associated. E. C. Nelson, Manager and Vice-President of Industrial, went with them. They found Associated in bad financial shape with no way of getting

money. Associated's business required the availability of substantial sums of money from time to time, and to insure the availability of such funds Associated and Industrial entered into the contract referred to in the following paragraph.

7. As a result of the visit or visits to South Carolina, Associated and Industrial entered into a contract dated January 1955, referred to hereinafter as the "master contract", of January 1955. In said contract Industrial is designated as the first party and Associated is designated as the second party. The pertinent parts of said contract are as follows:

> "This agreement entered into at Omaha, Nebraska, this —— day of January, 1955, by and between INDUSTRIAL LOAN & INVESTMENT CO., of Omaha, Nebraska, hereinafter referred to as Party of the First Part, and ASSOCIATED STORES, INC., a corporation of Columbia, South Carolina, hereinafter referred to as Second Party, witnesseth that:
>
> "(1) WHEREAS said First party is a corporation organized under the laws of the State of Nebraska, with its principal place of business at 1904 Farnam Street, Omaha, Nebraska, and
>
> "(2) WHEREAS Second party is a corporation operating a business of recail selling of Vacuum Cleaners and Sewing Machines, with its principal place of business located at Columbia, South Carolina, and sells much of said merchandise on Conditional Sales contracts and otherwise.
>
> "(3) WHEREAS said Second Party is desirous of selling and assigning said conditional sales contracts to said first party, and said first party agrees to purchase from said Second Party, from time to time, such contracts, covering new merchandise only, subject to the terms and conditions as therein expressed, or as is herein stated, as it may see fit.

"(4) THEREFORE it is considered that the sales or discount of such contracts as may be discounted by said Second Party to said First Party are to be negotiated upon the following terms and conditions:

"Twenty per cent of the amount due on each and all contracts dated prior to the date of this agreement, then 10% of the amount due on each and all contracts dated after the date of this agreement, shall be withheld by it and placed in a special reserve account on its books; there to be held for so long as any balance remains unpaid on any and all contracts purchased from said Second Party.

"(5) Should any one or more of said purchased contracts become delinquent in payments for a period of 45 days or more, and First Party has sent no less than TWO NOTICES, to the signor or assignee of the signor of said contract or contracts, addressed to his or her last known place of residence, or address, then and in that case First Party may demand payment of the balance unpaid on any such delinquent contracts or contracts from said Second Party, and said Second Party does hereby agree that he or it will, immediately, upon demand of said First Party, take up and pay to said First Party the unpaid balance remaining on any such delinquent contract or contracts.

"(6) All contracts purchased by said First Party shall be payable in equal monthly installments.

"(7) DISCOUNT RATE: All contracts purchased by said First Party, shall be discounted to it at the rate of Eleven (11%) per cent, for contracts running twelve months or less: and for contracts running twelve months or less: and for contracts running for a longer period than twelve months, there shall be added 1% for each additional month, or fraction thereof.

"(8) No contracts so purchased by said First Party

shall run for a longer period than eighteen months from date thereof.

"(9) MINIMUM DISCOUNT: The minimum discount on any contract shall be no less than $5.00.

"(10) REFUND OF DISCOUNT: In case of pre-payment of the contract or contracts, the minimum discount charge shall be as follows: (a) for 30 days or less $5.00; (b) for 30 to 60 days $7.00; (c) for 60 to 90 days $9.00. There shall be no refund of any part of the discount on contracts carried on the books of the First Party for 90 days or more.

"(11) Said First Party, may, at its option, charge the within mentioned reserve account with the unpaid balance of any or all of such delinquent contracts, or any indebtedness of Second Party or guarantor or guarantors thereof, if any, but Second Party agrees that said reserve account shall at all times be maintained at not less than 20% of the outstanding unpaid balance of all contracts purchased from said Second Party, and after all such contracts are paid in full, the reserve held by said First Party shall be returned to Second Party."

8. Kaye, Legend and Shiffman guaranteed performance of the contract in the following language:

"As a part of the consideration for the within contract, we and each of us, both jointly and severally, guarantee the performance of this contract according to its terms and hold ourselves each personally liable for any and all of the obligations under this contract."

9. At that time Associated was engaged in the sewing machine business, the sales on a monthly basis approximating a thousand dollars a month.

10. Following Kaye's and Legend's acquisition of stock

in Associated, Kaye became President of the company. Additional personnel was brought in from Kansas City and the organization was rebuilt.

11. Associated conducted its business from a store in Columbia, South Carolina until the middle of 1955 when it opened another store in Durham, North Carolina. About August 1955 Associated opened an office in Raleigh, North Carolina, which became the home office of the Company. Associated also operated a store in Richmond, Virginia.

12. A substantial part of the business of Associated consisted of sales of sewing machines on a time basis, a down payment usually being received by Associated and the deferred balance being represented and secured by a conditional sales contract. The form of the conditional sales contract is attached to the plaintiff's complaint, marked "Exhibit A" of the complaint.

13. Following the execution of the master contract of January, 1955, Associated forwarded to Industrial conditional sales contracts on merchandise sold to customers and within two or three days would receive back Industrial's check for the contracts sent them. Substantially all of Associated's business during the period of the January, 1955, master contract, involved transactions with Industrial under said contract.

14. On the second page of the printed forms of the conditional sales contracts used by associated appears a "Seller's Assignment and Guarantee" reading as follows:

> "FOR VALUE RECEIVED, the undersigned does hereby sell, assign, and transfer to Industrial Loan & Investment Co. or order, his, its or their right, title and interest in and to the within conditional sales contract and the property covered thereby and authorizes said assignee, or order, to do every act and thing necessary to collect and discharge the same including the right to endorse any check or draft payable to the undersigned in connection with this obligation.

"The undersigned GUARANTEES the within contract and the property described therein subject only to the right of the Purchaser set forth in said contract, I guarantee the payment of all amounts due and to become due by the terms of said contract, and all costs, including reasonable attorney's fees, incurred in collecting the money or attempting the collection thereof or the enforcement of any right under said contract or under this guaranty, and I hereby consent that extensions as to the time of payment may be made to the Purchaser, either before or after maturity, or that the said contract may be charged in any other particular without in any manner releasing me from liability. I agree that my obligations hereunder shall be enforceable even though the assignee's right to enforce the said contract, or any provision thereof, be suspended or impaired by any statute or otherwise, and hereby waive all statutes of limitation and the defense thereof."

15. Before conditional sales contracts were sent to Industrial by Associated, Kaye as President of Associated filled out and signed the seller's assignment and guarantee forms. This was true as to all contracts transmitted to Industrial by Associated during the entire course of dealings between the parties.

16. During the period of the master contract of January 1955, when the makers of conditional sales contracts, hereinafter sometimes called "customers", became delinquent, Industrial sent a series of letters to them. Concurrently Associated sent out letters to the customers. If payments were not remitted by the customers as a result of such letters, Associated sent its service and collection men to see the customers. No such personal contacts were made by Industrial.

17. During the period the parties were operating under the 1955 master contract, Industrial bore the cost of the

letters it sent out. Associated bore the cost of the letters it sent out, and also the cost of the contacts by its service and collection men. A large number of contacts by Associated's service and collection men were made during this time.

18. Under the master contract of 1955 customers made payments to both Industrial and Associated. Of the moneys received by Industrial on contracts transmitted to it under the 1955 master contract, the greater portion was paid by customers direct to Industrial. Some was transmitted by Associated to Industrial, either from collections made by it or from funds arising from repossessions.

19. In April, 1956 Nelson, Vice President of Industrial, advised Kaye that he was terminating his employment with Industrial and was opening a similar business in Omaha. Kaye notified Industrial that Associated was terminating its business with Industrial. Officers of Industrial thereupon conferred with representatives of Associated and as a result a new master contract was entered into between Associated and Industrial under date of May 4, 1956. The pertinent provisions of the May 4, 1956 master contract are as follows:

> "This agreement made and entered into this 4th day of May, 1956, by and between INDUSTRIAL LOAN & INVESTMENT CO., of Omaha, Nebraska, hereinafter referred to as First Party, and ASSOCIATED STORES, INC., of 2518 Hillsboro Street, Raleigh, North Carolina, hereinafter referred to as Second Party, Witnesseth that:
>
> "1. WHEREAS said First Party is a corporation organized under the laws of the State of Nebraska, as an Industrial Loan Investment Company, with its principal place of business at 1904 Farnam Street, Omaha, Nebraska, and:
>
> "2. WHEREAS said Second Party is a corporation

with its principal place of business at Raleigh, North Carolina, operating the business of retail selling of Vacuum Cleaners and Sewing Machines in North Carolina and adjoining states, and sells much of such merchandise on conditional sales contracts and otherwise, and

"3. WHEREAS said Second Party is desirous of selling and assigning said conditional sales contracts, and other evidence of indebtedness to said first party, and said First Party agrees to purchase from said Second Party from time to time, such contracts and other evidence of indebtedness, subject to the terms and conditions as therein expressed, or as herein stated, as it may see fit.

"4. THEREFORE it is considered that the sale or discount of such commercial paper as may be discounted by said Second Party is to be negotiated upon the following terms and conditions:

"5. DISCOUNT RATE: All contracts purchased by said First Party shall be discounted to it at the rate of ten (10%) per cent for contracts running twelve months or less:

"a. For contracts running for a longer period than twelve months, there shall be added 1% discount for each month additional or fraction thereof.

"b. No contracts so purchased by said First Party shall run for a period of time longer than eighteen months from its date.

"c. MINIMUM DISCOUNT: The minimum discount on any contract shall be not less than $5.00.

"6. REFUND OF DISCOUNT: In the case of pre-payment of the contract or contracts, the minimum discount shall be as follows:

"a. For 30 days or less..... $5.00.

"b. For from 30 to 60 days_____ $3.00

"c. For from 60 to 90 days_____ $5.00

"RESERVE FUND: Ten per cent (10%) of the amount due on each and all contracts or other evidence of indebtedness so purchased or discounted by said First Party, shall be withheld by First Party and placed in a Special Reserve Account on its books in the name of said Second Party, and there to be held as long as any balance remains unpaid on any and all contracts or other paper discounted by said Second Party, or other indebtedness if any, Corporate or private. After all such obligations are paid in full to First Party, the balance then remaining in said Reserve Account is to be returned to Second Party.

"8. The due date of payment on any such contracts shall be either the 5th; 10th; 20th; 25th, or 30th of each month.

"9. Contracts so discounted shall be received and retained by said First Party and filed according to the due date thereof.

"10. First Party to process coupon books, furnish by Second Party; and send to customers with letter of acceptance of the contract purchased.

"11. Second Party agrees to collect the monthly payments for First Party on each and every account so discounted, at its place of business and to send a detailed list of such payments collected together with the amount so collected, to First Party on or before Tuesday of each week.

"12. Upon repossession of the collateral, represented on any one or more such contract said Second Party does agree to immediately remit to said First Party, the unpaid balance due thereon.

"13. As a part of the consideration herein, said Second Party does hereby guarantee the ultimate collection and payment of any and all items so discounted to said First Party, and in case of any one or more of said conditional sales contracts or other items discounted to said First Party are not paid on or before any one or more of such items become sixty days delinquent, said Second Party agrees upon demand of First Party to immediately take up and pay, the unpaid balance or balances thereof.

"14. First Party, may, at its option, charge against said reserve account, any unpaid contracts, or other indebtedness, that is sixty days or more delinquent.

"15. First Party may, at its option, should it appear advisable to it, and in order to protect its interest in the money advanced by it; in case of financial difficulties or otherwise of said Second Party, notify all contract obligors to remit direct to it, the unpaid balances of any and all contracts held by said First Party.

"16. The parties hereto agree that the present Reserve Account on the books of said First Party in the name of said Second Party, shall be charged with the delinquent accounts to and including April 30, 1956, previously purchased from said Second Party and now held by First Party, and that the said Reserve Account shall then be built up by said Second Party and always remain at no less than Fifteen per cent (15%) of the outstanding balances of all items so discounted.

"17. First Party does agree that it will refund to said Second Party, at the end of each month, such amount in said reserve Account as may exceed 15% of the outstanding balances of all unpaid contracts, for so long as normal business relations continue.

"18. Second Party does hereby grant unto First Party, its agents or employees, the right to audit its

books as to all its accounts receivable and other records pertaining to its interest in determining the full fulfillment of the terms of this contract.

"19. Second Party agrees to sell and discount to First Party, all of its conditional sales contracts and or other installment sales paper resulting from the progress of its business, for a period of time of Five Years from date hereof, and First Party does agree to purchase said paper for said five year period or longer, in accordance with the terms of this agreement, on condition that the terms of this agreement are fully complied with by said second Party.

"20. This contract merges with, and supersedes the previous agreement entered into by and between the parties hereto, in January of 1955.

"21. A waiver for any period of time, of strict compliance of any of the terms of this contract shall not operate as a departure from, or a waiver of, any of the terms or conditions herein expressed.

"21½. On contracts picked up and paid off by Second Party after 90 days and prior to 12 months any discount over 10 % of the original contract will be refunded."

20. The performance of the master contract of May 4, 1956 was guaranteed by Legend, Kaye and Schiffman in the following language:

"As a part of the consideration for the within contract, we and each of us, both jointly and severally, guarantee the performance of this contract according to its terms and hold ourselves each personally liable for any and all of the obligations under this contract."

21. The master contract of May 4, 1956 was subsequently amended by supplemental agreement dated January 15, 1957 reading as follows:

"Supplemental Agreement, dated January 15, 1957. It is agreed between Industrial Loan and Investment Company, Corporation organized under the laws of the States of Nebraska, and Associated Stores, Inc., 2418 Hillsboro Street, Raleigh, North Carolina, that the discount rate referred to in a certain agreement dated the 4th day of May, 1956, by and between the two above parties, be increased in paragraph 5, to 11%. All other stipulations to remain as is. It is agreed that this supplement become a part of said original contract. This agreement to be effective on February 1, 1957."

22. The 1956 master contract was executed by Associated in North Carolina.

23. Under the 1956 master contract the transactions between the parties was substantially identical with that under the 1955 master contract, except as herein noted. Under the 1956 master contract the customers dealt directly with Associated. Industrial took Associated's payment books, letters and envelopes and sent them out to the customers for them to remit directly to Associated. The expenses of all of these items were paid by Associated.

24. Under the 1956 master contract the customers had specific dates to make remittances to Associated. If payments were not received, Associated sent out from its office a series of collection forms and letters and if these proved unavailing collection men were sent out. The expense of this procedure was borne by Associated.

25. Under the 1956 master contract, the due dates of payments from customers were to be either the 5th, 10th, 15th, 20th, 25th or 30th of each month, and remittances by Associated to Industrial were to be made on Tuesday of each week. However, by mutual understanding between the parties shortly after the execution of the contract of May 19th, the due dates of customer payments were changed to the 5th, 10th and 20th of each month with remittances from As-

sociated to Industrial to be made promptly after each of the latter dates.

26. Associated maintained at its home office a separate ledger card for each conditional sales contract transmitted to Industrial under the 1956 master contract. These cards, referred to as account cards, were divided into two columns. The left-hand column, designated "House," contained entries with respect to payments made to Associated by the makers of conditional sales contracts. The right-hand column, designated "Bank," contained entries with respect to remittances made by Associated to Industrial.

27. When Associated transmitted Conditional sales contracts to Industrial, under either of the two master contracts, it sent them in groups. Accompanying each group of contracts was a memorandum denominated a "letter of transmittal." This memorandum was simply a blank sheet or sheets of paper upon which had been entered in columnar form, the account number of each customer, his name and address, and an amount. The columns carry no explanatory heading. The amount entered in the amount column was the gross amount payable on the conditional sales contract. At the end of each memorandum the amounts were totalled and beneath this was the signature of an official of Associated, usually Kaye.

28. Upon receipt of a group of contracts and a "letter of transmittal" from Associated, Industrial prepared an individual ledger card for each account, showing thereon the customer's name and account number and the gross amount of the contract. It then computed the discount and reserve on each individual contract. Next it computed the gross amount of all the contracts in the group and the amount of the discount and the reserve for the group. It then remitted to Associated a check for the gross amount of the contracts less the reserve and the discount. The check so remitted showed this breakdown.

29. The amount so computed for the reserve with respect to a group of contracts was transferred to an account of the books of Industrial designated as Associated's reserve account. Amounts computed as discount were transferred to an income account of Industrial.

30. Payments transmitted by Associated to Industrial for application on contracts held by Industrial were usually transmitted on a listing captioned "Payments to Omaha (i.e., Industrial) *from Associated Contracts Due*" with an appropriate date inserted after the word "Due." The listing was set up in columnar form, the four columns being headed as follows:

Account # Name Amount Remarks.

In these columns there were listed a number of payments relating to numerous contracts. One weekly listing generally was composed of several pages of payments. Associated sent to Industrial with each listing a check to cover the aggregate amount shown on the listing.

31. The two master contracts between Associated and Industrial, and the practice between the companies, contemplated the "repurchase" of conditional sales contracts by Associated from Industrial in certain instances. Originally, when Associated transmitted funds to Industrial for the repurchase of a contract, the information with respect thereto, and the funds for such repurchase, were included in one of its regular payment listings. In May 1957 Associated commenced the practice of sending separate listings related to the repurchase of contracts.

32. When Industrial received a payment listing from Associated, it posted each individual payment shown on the listing to the ledger card relating to that account. The aggregate amount thus posted to the individual accounts was then posted to Industrial's general ledger control account for Associated Stores, which account was entitled "Associated Stores, Inc.—5F."

33. From January 1955 until the institution of this action Industrial continually recognized the makers of said conditional sales contracts as Associated's customers to whom Associated was responsible for service and with respect to whom Associated was responsible to Industrial to the extent of the full unpaid balances of said conditional sales contracts.

34. Upon the hearing one of the major controverted points concerned "across the board" listings of payments made by Associated under the May 4, 1956 master contract. During all or some portion of the period from May 4, 1956, to December 17, 1957, Associated, in making up its payment listings, simply listed all or substantially all payments that were due on individual contracts, regardless of whether such payments had been received from the customers, and remitted to Industrial a check for the aggregate amount of such payments. Moreover, even though a customer had paid to Associated more money in payments than the payment schedule of his conditional sales contract called for, Associated remitted to Industrial only payments actually due on the conditional sales contract, not informing Industrial that the customer was ahead on his payments. As a result, although Associated's ledger cards clearly reflected the amount of payments received from customers, and the amounts remitted to Industrial, the two figures bore no relation to one another. In large numbers of cases, the customers had paid more to Associated than Associated had remitted to Industrial. In large numbers of cases, exactly the reverse was true. This practice is referred to as "across the board" listings.

35. The remittances received by Industrial did not disclose on their face that they were "across the board" listings. Industrial posted the payments included on the listings to the individual customers ledger cards in the manner indicated on the listing.

36. Associated claims that its practice of making "across the board" listings began at the time of the execution of the 1956 master contract and continued as long as payments were remitted, and that Industrial was fully aware of the practice from its inception. Industrial denies this entirely, claiming that the practice commenced only about December 1956 when Associated became hard pressed financially, and than Industrial never became aware of the practice until October or November 1957. I find that the time when the practice began is immaterial, and make no finding on that point.

37. While the evidence is conflicting as to whether Industrial knew or should have known of Associated's practice of making "across the board" listings, I find that Industrial did not know of the practice, nor should it have known, until October 1957 at which time it took prompt action to determine the extent of the practice and to correct it.

38. As a result of Associated's practice of making "across the board" listings, whether done for that purpose or not, Industrial was not aware of the large numbers of accounts on which the customer was more than 60 days delinquent in his payments. When the extent of this delinquency was discovered by Industrial in November 1957, it manifested its intention to Associated of demanding repurchase of such delinquent contracts by Associated. At that time Associated would have been financially unable to do so.

39. In the fall of 1957, Associated was in serious financial difficulties, constantly late in making remittances to Industrial and able to do so only with funds received from Industrial for the purchase of new contracts.

40. Associated followed another practice materially affecting the parties which was unknown to Industrial until after the institution of this action. When a customer became delinquent in his payments to Associated, Associated

frequently had its employees obtain the machine and bring it to the premises of Associated. Instead of treating the machine as repossession, which would have obligated Associated to repurchase the conditional sale contract on the machine from Industrial, Associated put the machine in what it termed a "hold" category. Frequently it was not taken from the "hold" category and treated as a repossession until approximately the time that the machine was resold. In numerous instances the first conditional sales contract on the machine was not repurchased from Industrial until after another conditional sales contract, taken from the second purchaser, had been transmitted to Industrial and the funds received therefor. Whether so intended or not, the effect of the practice of using the "hold" category for machines taken from customers was to delay at the will of Associated and without the knowledge of Industrial the obligation to repurchase the conditional sales contracts involved.

41. By the end of April, 1956, when the 1955 master contract was superseded, Associated had transmitted to Industrial under the 1955 master contract, in 118 groups, approximately 2,000 conditional sales contracts. The total unpaid balances of said conditional sales contracts, at the time of their transmission to Industrial, aggregated $273,054.71. Industrial, by a procedure set forth herein, retained $32,350.26 as "discount," placed $25,452.67 in an Associated Stores reserve account, and remitted to Associated $215,251.78.

42. From the first of May, 1956, through December, 1957, Associated transmitted to Industrial under the 1956 master contract, in 235 groups, approximately 5,500 conditional sales contracts, the total of the unpaid balances of said conditional sales contracts, at the time of their transmission to Industrial, aggregating $738,769.41. Industrial, by a procedure set forth herein, retained $86,273.74 as "discount."

placed $65,938.08 in an Associated Stores reserve account, and remitted $586,557.59 to Associated.

43. During the period of the 1955 master contract Associated remitted to Industrial, by Associated's checks, $24,654.84 from collections from customers. In addition, during the period ending May 1, 1956, Associated had remitted to Industrial on account of repossessed machines the sum of $56,834.46.

44. From and after May 1, 1956, Associated remitted to Industrial $13,073.47 representing payments on account of conditional sales contracts transmitted to Industrial under the 1955 master contract, and $21,249.30 on account of machines repossessed in connection with conditional sales contracts transmitted to Industrial under the 1955 master contract.

45. In connection with conditional sales contracts transmitted to Industrial under the 1956 master contract, Associated transmitted to Industrial $310,095.21 on account of payments and $53,774.26 on account of repossessions.

46. Kaye and Legend, in addition to their interest in Associated, were partners in a similar type business in Kansas City, Missouri, known as "Best Sew-Vac." This business apparently became in arrears to Industrial on certain obligations in the amount of $43,000.00. In October, 1957, following conferences between Kaye and Legend with representatives of Industrial, Industrial drew an unsigned check dated October 3, 1957, in the amount of $19,493,500 payable to the order of Associated Stores, Inc. and forwarded the check to Associated. Associated endorsed the check and returned it to Industrial. The reserve account of Associated was charged with the amount of $19,493.50. This payment was supposed to be for the payment of purchase price of $19,493.50 of conditional sales contracts transmitted by Best Sew-Vac to Industrial and then held by Industrial, but such contracts were never transmitted by Industrial to Associated.

47. During the course of the Best Sew-Vac transaction Associated also delivered to Industrial a note for $13,000.00 for the purchase from Industrial of additional Best Sew-Vac contracts, but no such contracts have been transmitted by Industrial to Associated. No payment has been made upon the note by Associated.

48. In the latter part of 1957, but prior to December 1957, Industrial required Kaye to take out a $25,000.00 insurance policy making Industrial the beneficiary. Associated paid the premiums.

49. In September 1957 Industrial notified Associated that by reason of the fact that the bank examiners were concerned about Associated's delinquencies and were "alarmed on an account that is growing so large as far from the basis (sic) of operations, plus the fact that you are making your own collections," Industrial would discontinue accepting contracts from Associated until its reserve has reached 20% and the payments come in exactly as outlined in the contracts. Industrial also notified Associated that it was necessary for it to furnish a fidelity bond in the amount of $35,000.00 to cover the payments "you are collecting for us." Associated was advised to investigate the possibility of obtaining local financing.

50. On December 13, 1957, Industrial wrote the makers of conditional sales contracts which had been transmitted to it that their account with Associated had been sold and assigned to Industrial and that all future payments were to be made to Industrial. Associated had not assented to the writing of this letter.

51. As a result of Industrial's letter to the makers of conditional sales contracts, Associated countered by writing them another letter advising them to ignore Industrial's letter and continue to send their remittances to Associated.

52. On December 18, 1957, when this action was pending in the Superior Court of Wake County, North Carolina, a

restraining order was entered in this cause by Superior Court Judge William Y. Bickett upon the application of Associated reading as follows:

"This cause coming on to be heard before the Undersigned upon the verified complaint of plaintiff and said complaint being treated as an affidavit and it being made to appear and the Court finding that defendant has begun and threatens to continue to approach, persuade, harass and confuse plaintiff's customers to the end that monies might wrongfully be diverted to its use; that said efforts and practice, if permitted to continue, could bring about the impairment of plaintiff's business and of the value of security held by defendant and assigned, piedged and guaranteed by plaintiff; that plaintiff is without adequate remedy at law to protect its interest in said security and the business in which it is engaged; and that, unless equitable relief is now granted plaintiff may be irreparably injured and damaged.

"Now, therefor it is ORDERED that defendant, its officers, agents, servants and employees be and they are hereby temporarily restrained and enjoined from performing any act or engaging in any practice effort to secure the payment to defendant, its officers, agents, servants or employees by any of plaintiff's customers of any part of any balance due under any conditional sales contract held by defendant as security for any indebtedness of plaintiff to defendant or otherwise held by defendant and from engaging in or performing any act, practice or effort that might injure or damage plaintiff's business or the normal progress thereof.

"Bond as provided by law is fixed as $10,000.00.

"It is further ORDERED that defendant should appear on the 5th day of January, 1958, before His Honor Raymond Mallard at the Wake County Court House in

Raleigh, North Carolina, at 2:30 P.M. or as soon thereafter as the Court may direct and show cause. If any it has, why this order should not be continued to the trial of the cause on the merits.

"This 18th day of December, 1957."

53. This action was subsequently removed to the United States District Court for the Eastern District of North Carolina and on February 4, 1958, an order was entered by United States District Judge Don Gilliam reading as follows:

"This came on to be heard at Raleigh, North Carolina, on the 6th day of January, 1958; the following were present:

"Mr. J. C. B. Ehringhaus, Jr., of Ehringhaus and Ellis, Attorneys for Associated Stores, Inc., and Irving Kaye;

"Mr. Irving Kaye, President, Associated Stores, Inc.;

"Mr. Howard E. Manning and Mr. John H. Manning, of Manning and Fulton, Attorneys for Industrial Loan and Investment Company;

"Mr. L. A. Dillman, President of Industrial Loan and Investment Company, and Mr. E. G. Zimmerman, an employee of that Company.

"The hearing was had upon the pleadings filed, treated as affidavits, the affidavits filed by Mr. Irving Kaye, Mr. L. A. Dillman and Mr. E. G. Zimmerman, the motions made by the parties hereto, discussion of the issues involved; the contentions with respect to the relationship of the parties, briefs submitted at the request of the Court and argument of counsel; and after consideration and for the purpose of this order only, the Court makes the following findings of fact and conclusions of law:

"1. Associated Stores, Inc., is a South Carolina corporation, domesticated in North Carolina, with its principal office in Raleigh, North Carolina.

"2. Industrial Loan and Investment Company is a Nebraska corporation with its principal office in Omaha, Nebraska.

"3. Associated Stores, Inc., and Industrial Loan and Investment Company entered into written agreements, one dated January ——, 1955, copy of which is attached to defendant's answer and marked 'Exhibit A', and one dated May 4, 1956, attached to plaintiff's complaint marked 'Exhibit C', and to defendant's answer and cross-claim marked 'Cross-Claim Exhibit A'.

"4. Associated Stores, Inc., sold conditional sales contracts to Industrial Loan and Investment Company, and Industrial Loan and Investment Company purchased said contracts according to the terms of purchase and sale set out in the agreements.

"5. The agreement of January ——, 1955, has been fully complied with by both parties.

"6. Associated Stores, Inc., has made substantial collections from conditional sales contract obligors under the provisions of the May 4, 1956, agreement and has remitted substantial amounts so collected to Industrial Loan and Investment Company, but has not remitted all the collections it has made, and the collections not reported or remitted to Industrial Loan and Investment Company amount to between thirty-five and forty thousand dollars for the period October 11-November 30, 1957, and a substantial amount since December 10, 1957.

"7. Industrial Loan and Investment Company has made collections on a group of about four hundred contracts which it elected at the time of purchase to notify

obligors to pay direct to it, and such collections as it has made on said contracts have not been reported to Associated Stores, Inc.

"8. Industrial Loan and Investment Company has received payments from contract obligors between December 13, and December 31, 1957, as a result of its letters of December 13, 1957, in the amount of ONE THOUSAND TWO HUNDRED EIGHTY AND 58/100 ($1,280.58) DOLLARS.

"9. Associated Stores, Inc., has made substantial collections from contract obligors since the institution of this action, the issuance of the temporary restraining order and injunction and the filing of a $10,000.00 bond with surety as required by said order, all of which occurred on December 18, 1957, and these collections have not been reported or remitted to Industrial Loan and Investment Company.

"10. The unpaid balances on conditional sales contracts purchased by Industrial Loan and Investment Company amount to between three hundred and three hundred fifty thousand dollars.

"11. Until shortly before institution of this proceeding all contact with said contract obligors and all servicing of equipment was made by plaintiff and the value of said conditional sales contracts is directly affected by collection efforts and equipment servicing facilities and personnel.

"The agreements of January ——, 1955, and May 4, 1956, were and are valid and binding between the parties.

"Associated Stores, Inc., may retain all amounts which it has collected prior to the date of this order on conditional sales contracts sold by it to Industrial Loan and Investment Company pending the final de-

termination of this motion. Industrial Loan and Investment Company may during said interim period retain all funds in any reserve account established under said contract of May 4, 1956, and any amounts which have been paid to defendant with respect to said contract obligor accounts.

"Industrial Loan and Investment Company is entitled to collect and have paid direct to it all future payments on contracts which it purchased.

"The temporary restraining order and injunction issued by Judge Bickett on December 18, 1957, should be dissolved forthwith and this cause retained for further proceedings of the surety bond.

"Associated Stores, Inc., its officers, agents and employees, should be restrained and enjoined from interfering with Industrial Loan and Investment Company in collecting and receiving any and all payments on said conditional sales contracts.

"It is, therefore, ORDERED:

"1. That the temporary restraining order and injunction issued by the Honorable William Y. Bickett, Resident Judge, Superior Court of Wake County, North Carolina, on December 18, 1957, be and it is hereby dissolved.

"2. That Associated Stores, Inc., its officers, agents, servants and employees, be and they are hereby restrained and enjoined until the further order of the Court from hindering, delaying or interfering with Industrial Loan and Investment Company in collecting and receiving from contract obligors payments on conditional sales contracts purchased by Industrial Loan and Investment Company from Associated Stores, Inc., and they are further restrained until the further order of the Court from accepting payments on said contracts

except for transmittal to Industrial Loan and Investment Company in the original form received, with endorsement, where necessary.

"3. That Associated Stores, Inc., make available to Industrial Loan and Investment Company its individual ledger cards on said conditional sales contracts and permit duly authorized representatives of Industrial Loan and Investment Company access thereto for the purpose of reconciling the balance due and owing by each obligor.

"4. That this order is effective as of the opening of business February 5, 1958, and only until the further orders of the Court and the findings herein are based upon prima facie conclusions only.

"5. That this cause is retained for further orders and proceedings.

"This the —— day of February, 1958."

54. Under the restraining order of Judge Bickett Associated made all collections from December 17, 1957, to February 4, 1958, collecting during that time the sum of $16,057.78. On February 4, 1958, following Judge Gilliam's order, collections were taken over by Industrial and have been made solely by Industrial since that date. During the latter part of 1957 and early in 1958 a series of letters were written to customers by both parties, each at first claiming the right to make collections from customers, and each later notifying customers of the court orders favorable to them relative to collections. After December 17, 1957, neither party would assume the responsibility of servicing customers' machines, and as a mild understatement, there was a noticeable lack of cooperation between the parties relative to collections following the institution of this action. Needless to say, collections deteriorated.

55. Under the 1956 contract the gross amount of all con-

tracts which were tra..smitted to Industrial which were subsequently paid in full to Industrial was $198,673.53.

56. With respect to machines picked up and placed in the "hold" category and subsequently transferred from the "hold" category to the "repossessed" category after approximately October 1, 1957, no accounting has been made to Industrial by Associated with respect to such machines even though balances were still shown to be due Industrial. Most of these machines have been sold by Associated. In all of such instances the amounts realized from such sales have been retained by Associated.

57. Approximately 200 of the machines "repossessed" by Associated during the period subsequent to approximately October 1, 1957, were turned over to Irving Kaye personally.

58. Some of the machines repossessed during said period were subsequently re-sold to customers and new conditional sales contracts taken from customers. Some of these conditional sales contracts were transferred to Morse Sewing Machine & Supply Corp. for application upon the indebtedness of Associated to that corporation, and some of them were pledged to Wachovia Bank and Trust Company as security for a loan.

59. There have been no transfers of monies between Associated and Industrial since the institution of this action on December 18, 1957.

60. With respect to conditional sales contracts transmitted by Associated to Industrial under the 1956 contract, the status of these contracts is as set forth in the following categories. The first category, entitled for convenience "House Accounts" includes information with respect to accounts in which the customer still owed a balance on his conditional sales contract but Industrial had received payments of the full amount due under the contract. In many but not all of the cases in this category, the machine secured by

the conditional sales contract had been repossessed by Associated.

61. The total amount remitted by Associated to Industrial on the "House Accounts" was $89,175.81, while the amounts collected from customers on these accounts amounted to $17,878.90, the difference between the two amounts being $71,296.91. Included in this amount of $71,296.91 is the sum of $53,774.26 which was remitted by Associated to Industrial in instances where Associated had repossessed the machines secured by the conditional sales contracts of customers. These machines so repossessed by Associated were sold by it for a net sales price, either in the form of cash or new conditional sales contracts, of $75,059.75.

62. The second category of accounts, entitled for convenience "Accounts on Which Customer Has Paid More Than Associated Has Paid Industrial or Remitted to Industrial," includes information with respect to accounts in which Associated has collected more from customers than Associated has remitted to Industrial.

63. With respect to the accounts on the second category, Associated collected from customers the sum of $186,535.00, and remitted to Industrial $135,830.80, the difference between the two amounts being $50,704.20.

64. The third category of accounts, entitled for convenience "Accounts Where Customer Has Paid *Less* Than Associated Has Paid Industrial (Balance Still Due Industrial)," includes information with respect to accounts in which a balance is still due to Industrial as shown on the records of Associated and in which Associated has paid Industrial more than the customers have paid Associated. In 217 instances in this category, Associated has repossessed the machines secured by said conditional sales contract but has not repurchased the contracts from Industrial. The amount due Industrial on these contracts is $19,486.72.

65. In the third category of accounts, in approximately 35 instances of the 217 mentioned above, where Associated had transmitted conditional sales contracts of customers to Industrial and had received moneys from Industrial therefor, Associated repossessed the machines secured by said conditional sales contracts, resold them to other purchasers, took conditional sales contracts for portions of the purchase price, transmitted the new conditional sales contracts to Industrial and received moneys therefor without remitting to Industrial the balances shown on the records of Associated as being due Industrial on the original conditional sales contracts. These instances apparently occurred during the latter part of 1957 when the controversy had arisen between Associated and Industrial as to the methods Associated should follow in making remittances to Industrial. The sales of these machines the second time amounted to $6,875.49.

66. In the third category of accounts, in 64 instances of the 217 Associated repossessed machines on which a balance is due Industrial according to the records of Associated, sold the machines to new purchasers and took new conditional sales contracts therefor and retained these accounts as House Accounts. Some of these contracts have been assigned as collateral to Wachovia Bank and Trust Company to secure a loan to Associated, and some have been transferred to Morse Sewing Machine Company as a credit upon the indebtedness of Associated to Morse. The sales price of these machines, to the new customers, including the discount, amounted to $13,695.00.

67. In the third category of accounts in 18 additional instances Associated repossessed machines on which a balance is due Industrial according to the records of Associated, sold the machines to new purchasers for cash or sold on credit and took new conditional sales contracts therefor and did not assign a House Account number or any other type

of number. The sales of these 18 machines, including the credit allowed to the customer, amounted to $3,094.05.

68. In the third category of accounts, in 99 additional instances, Associated repossessed machines on which a balance was due Industrial according to the records of Associated. Several of these machines were given away as prizes.

69. With respect to accounts in the third category, Associated has collected from customers the sum of $31,514.85 and remitted to Industrial $66,782.47, the difference between the two amounts being $35,267.62.

In this category, in the case of 512 customer contracts, the customer was more than 60 days past due in his payments to Associated under the contract, although, on account of the "across the board" payments by Associated to Industrial, these accounts were not shown as more than 60 days past due on the account cards of Industrial. The amounts due by customers on these 512 accounts as of December 17, 1957, was $75,369.74, but according to the account cards of Industrial there was due only $52,733.79, the difference of $22,635.95 being represented by advance payments made by Associated on these accounts. In 57 other instances in the third category of accounts but not included in the 512 accounts mentioned above, Associated had repossessed the machines secured by the conditional sales contracts on these accounts prior to December 17, 1957, and resold the machines without repurchasing the original contracts from Industrial. The balance due Industrial on these 57 contracts was $4,796.40.

70. With respect to certain machines repossessed by Associated under conditional sales contracts which had been transferred to Industrial and on which balances were still due Industrial according to the records of Associated, an unidentified number of machines were transferred to Aladdin Sales, Inc. Associated was indebted to Kaye for an un-

specified amount of money, and Kaye took the machines in exchange for that debt. Kaye then turned the machines over to Aladdin Sales, Inc. with the understanding that LeRoy Simons, who was an employee of Associated, President of Aladdin Sales, Inc. and a good friend of Kaye's, would repay Kaye. The machines were transferred to Aladdin Sales, Inc. but for reasons not appearing in the records Simons owes Kaye for the machines. The amount of Simon's indebtedness to Kaye for the machines has not been settled.

71. In certain instances, sums were forwarded to Industrial in excess of any amounts due Industrial according to its records on accounts which had been transferred by Associated to Industrial or on accounts not held by Industrial. In such cases, Industrial retained such amounts and credited them to a special Associated account designated Account 52. The total amount so retained by and credited by Industrial was $3,348.46.

72. The final balance shown on Associated's reserve account with Industrial was $44,150.42.

73. No remittances were made after September 1957 by Associated to Industrial on account of monthly payments due.

74. On machines repossessed by Industrial, it first undertook to sell the machines to Associated. When Associated made no response to requests by Industrial for bids on the repossessed machines, Industrial sold the machines elsewhere. Industrial kept Associated advised of the prices it was seeking to obtain for the machines, but Associated made no reply. Industrial sold 289 repossessed machines for the total sum of $8,621.87.

75. As a result of a report of the Nebraska State Banking Department, L. A. Dillman, President of Industrial, came to Raleigh on October 14, 1957. At the suggestion of Kaye, Dillman examined some of the ledger cards of Associated.

There were some accounts on which Associated had not remitted to Industrial all that it had collected from customers, and some accounts on which Associated had remitted to Industrial more than it had collected from customers. At this time Associated was also slow in transmitting remittances to Industrial. Kaye and Dillman agreed that Industrial would send an employee to the offices of Associated to work with Associated in connection with accounts transmitted by Associated to Industrial.

76. From time to time contracts held by Industrial became more than sixty days delinquent. Industrial made demand upon Associated for repurchases of such contracts and they were in fact repurchased by Associated. Later, as Associated became slow in making remittances for such repurchases, Industrial adopted the policy of charging the reserve account of Associated and then writing "charge-back" letters to Associated, calling upon Associated to transmit the necessary funds to replenish the reserve account by the amount of such contracts. As of the time of the institution of this action, all such charge-back lettters had been complied with by Associated.

77. Following Dillman's conferences with Kaye on October 14, 1957, and subsequent conferences, E. G. Zimmerman, an employee of Industrial, came to Raleigh on November 8, 1957, and remained in Raleigh thereafter as the representative of Industrial. Zimmerman's instructions were to work in Associated's office and make weekly reports of total collections that have been made, along with identification such as name and account number, and to remit to Industrial each week the payments that have been made. He was also to report any repossessions that had taken place, and to assist Associated with collection work. He was further instructed to report certain instances where Associated was remitting payments to Industrial on accounts even though such payments had not been collected from the customer.

78. Examination of Associated's ledger cards by Zimmerman, as of November 18, 1957, revealed that of the accounts which had been transmitted to Industrial, there were 321 accounts in which the customer was in arrears thirty days, 200 in which the customer was in arrears sixty days, and 369 in which the customer was in arrears for more than ninety days.

79. Zimmerman commenced calling upon Associated to re-purchase certain of the contracts on which the customer was more than sixty days in arrears in payments. At the time of the institution of this action Associated had not re-purchased all of these contracts. According to the account cards maintained by Industrial, the customers whose contracts were involved were not sixty days in arrears, but according to the account cards of Associated they were more than sixty days in arrears, the conflict between the cards being caused by the fact that Associated's cards reflected the actual payments made by customers while Industrial's cards reflected the application of payments received by it according to the transmittal letters furnished it by Associated.

80. At the time of the hearing Industrial held 871 accounts which still had not been paid in full and which were still paying. And at the time of the hearing Industrial still had on hand 666 repossessed sewing machines which it had not disposed of. Industrial's evidence was to the effect that a price of $30.00 per machines a fair average for these machines. No sufficient evidence as to the make, quality and condition of the machines is in the record to form a judgment as to the valuation of $30.00 per machine, but in the absence of rebuttal testimony by Associated, and in the absence of any reply or protest by Associated to Industrial's letter in regard to the disposition of the machines, I find that $30.00 per machine is a fair and reasonable value for said 666 machines.

81. No evidence in the record indicates that either party

regarded the transactions between Associated and Industrial under either of the master contracts as being loan transactions, but in fact both regarded their transactions as sales of conditional sales contracts at a discount until the time Associated instituted this action for usury.

82. There is no evidence (1) that Industrial maintained any office in the State of North Carolina prior to October 1957, (2) that it was domesticated in this state, (3) that it had a process agent within the state, (4) it was doing business within this state, (5) or that with the exception of isolated visits of only several days duration it had any officers or agents within the state until October 1957.

83. Both master contracts provided for rebate of discount in certain instances for early payment of contracts. The total of rebates of discount by Industrial to Associated on contracts financed under the first master contract amounted to $5,257.95, and under the May 4, 1956, master contract amounted to $4,151.20.

84. Net discount in the amount of $18,612.16 was charged by Industrial on contracts which were transmitted to it under the 1956 master contract and which were paid in full prior to the institution of this action.

85. The gross amount outstanding of all contracts held by Industrial which had theretofore been transmitted to it by Associated, as of December 17, 1957, was $359,810.03. The amount in Associated's reserve account as of that date was $44,155.50. The amount of Associated's special reserve account, as of January 5, 1959, was $3,348.46. The gross amount outstanding of all contracts held by Industrial which had theretofore been transmitted to it by Associated, as of January 5, 1959, was $216,727.28.

86. The gross amount of contracts outstanding on December 17, 1957 in the amount of $359,810.03 includes principal plus the "discount" charged by Industrial, this discount being in excess of the legal rate of interest allowed by law.

To determine the amount of the discount included in the gross figure of $359,810.03 would require computations to be made from each individual contract. No such computations were offered in evidence.

87. Since the discount rate under both "Master Contracts" was 11 per cent on all contracts running one year or less, with an additional 1 per cent for each month in excess of twelve, at least 5 per cent discount was charged in excess of the statutory rate allowed by law. The plaintiff has therefore sustained the burden of proof that with respect to contracts purchased under the 1956 Master Contract, 5 per cent usurious interest was charged, but it has not sustained the burden of proof that any amount above 5 per cent usurious interest was charged.

88. I therefore find that the gross amount of contracts outstanding on December 17, 1957, in the amount of $359,810.03 included principal plus 11 per cent discount, and that the principal amounted to $324,153.18 plus 11 per cent discount in the amount of $35,656.85. Discount at the rate of 6 per cent on the principal sum of $324,153.18 would have amounted to $19,449.19, the discount is excess of the legal rate of interest being $16,207.66.

89. Contracts were transmitted to Industrial by Associated under the 1956 Master Contract from May 1956 through December 2, 1957. Insofar as the evidence shows, the outstanding balance of $359,810.03 may have represented contracts transmitted to Industrial at any time during this time interval, although it would appear probable that the greater portion of this amount represents contracts purchased during the latter part of the time interval mentioned above. Since discount was collected in advance on the contracts so purchased, the defendant has sustained the burden of proof that interest collected in advance on such contracts was for a period which expired at least by December 2, 1958 and that it is therefore entitled to interest from December 2, 1958, but it has not sustained the burden

of proof that the period for which interest was collected in advance expired prior to December 2, 1958.

All of the findings of fact set forth above are not necessary for the conclusions of law contained hereinafter, but are made at the request of one or the other of the parties for the purposes of the record.

CONCLUSIONS OF LAW

A. No evidence having been offered as to the state in which either master contract was executed, except that Associated executed the May 4, 1956 master contract in North Carolina, and the parties in the hearing and in their briefs having accepted the law of North Carolina as being applicable, the law of North Carolina is held to be the law applicable to the matters in controversy.

B. Notwithstanding the fact that the parties themselves regarded their transactions as sales and purchases rather than loans, they nevertheless intended to carry out the exact transactions provided for in both master contracts including "repurchase" of delinquent contracts, the unconditional guarantee of the accounts by Associated, and other factors, all of which are recited in the findings of facts, and I conclude as a matter of law that the transactions between the parties as set forth in the findings of fact, constitute loan transactions rather than sales and purchases of contracts.

C. While a corrupt intent to violate the law is an essential ingredient of usury under the law of North Carolina, this in the final analysis can mean nothing more than a deliberate intention to perform the acts which as a matter of law constitute usury. To hold otherwise could result in two identical transactions being usurious in one case and free from usury in the other, depending solely upon the degree of sophistication of the defendants in the two cases. I conclude therefore that Industrial possessed the required degree of intent to be guilty of usury.

D. The transactions between the parties having been held as a matter of law to be loans, which Associated unconditionally guaranteed and was obligated to repay, an interest rate in the form of discount of 11% under the first master contract and 10% under the second for contracts of one year or less and 1% for each month in excess thereof having been charged, and Industrial having been held as a matter of law to have the necessary intent to violate the law, it follows that with the limitations set forth hereinafter the transactions between Industrial and Associated were tainted with usury.

E. Certain legal principles attach to each usurious transaction. In order to determine the rights of the parties, therefore, it becomes necessary to determine whether the entire dealings of the parties constitute one transaction, or whether the matters encompassed in each of the master contracts of January 1955 and May 4, 1956, constitute separate contracts, or whether each "purchase" of a contract under either of the master contracts constitutes a separate transaction. It is the exaction of usury, not the entering of an agreement to finance contracts in the future at a usurious rate of interest, which the law condemns. It follows that each "purchase" of a conditional sales contract constitutes a separate transaction for the purposes of this action.

F. Notwithstanding the terms of the statute, G. S. 24-2, where the borrower seeks the aid of the equity court in the nature of an equitable interposition, he must, as a condition to the grant to him of equitable relief, pay not only the principal but also the legal rate of interest, thus substantially mitigating the effect of the statutory penalty.

G. While Associated here instituted an action in the nature of debt to recover the statutory penalty for usury, it simultaneously evoked the equitable jurisdiction of the court by obtaining a temporary restraining order and applying for an injunction restraining Industrial from inter-

fering with collections by Associated from customers. Such action on the part of Associated restricts any recovery by Associated with respect to contracts, then remaining unpaid to amounts paid in excess of the principal debt plus interest at six per cent.

H. Usury must be paid in money or money's worth before an action can be maintained therefore. I conclude that:

(1) Payment by Associated to Industrial from Associated's own funds is a sufficient payment to support a claim of usury by Associated.

(2) Payment by Associated from funds collected from customers, regardless of whether the contracts of such customers were held by Industrial, is a sufficient payment to support a claim of usury by Associated.

(3) Payment by customers to Industrial (either direct or through Associated) on contracts executed by such customers to secure the balance of payment of merchandise sold them by Associated and "discounted" by Associated to Industrial, is a sufficient payment to support a claim of usury by Associated.

(4) Satisfaction of a contract indebtedness, in whole or in part, through repossession by Industrial of a machine secured by such conditional sales contract held by Industrial, is, to the extent of the amount realized from disposition of the machine, if disposed of, and if not, to the extent of the fair market value of the machine, a sufficient payment to Industrial to support a claim of usury by Associated.

(5) The amount of any funds held by Industrial in either of the reserve accounts of Associated, but not specifically applied to the payment of any given account, cannot be considered as a sufficient payment to support a claim of usury by Associated. However, the withdrawal of funds from the reserve account of Associated and the application of such funds to the payment of contracts held by Indus-

trial is a sufficient payment to support a claim of usury by Associated.

I. The two year statute of limitations for usury did not commence to run against Associated until October, 1957, and this plea is thus not available to Industrial.

J. All contracts under the January, 1955, master contract having been paid in full, either by customers or by Associated or by repossessions before the institution of this action, Associated is entitled to recover from Industrial twice the amount retained by Industrial as "discount" on contracts purchased under the January 1955 master contract.

K. From the aggregate discount retained by Industrial under the 1955 master contract in the amount of $32,350.26, the aggregate rebate of discounts under the 1955 master contract in the amount of $5,257.95 should be deducted, leaving net discount under the 1955 master contract of $27,092.31. Associated is therefore entitled to recover $54,184.62 on account of usury collected by Industrial on contracts transmitted to it under the 1955 master contract.

L. During the term of the 1956 master contract, this action was instituted and Associated sought equitable relief in the nature of an injunction. At that time some of the contracts transmitted to Industrial under the 1956 master contract had been paid in full, but a substantial number had not. With respect to those which had been paid in full when this action was instituted, no equitable relief has been sought by Associated. As to them, I conclude that Associated is entitled to recover twice the amount of the net discount retained. With respect to the contracts which had not been paid in full when this action was instituted, Associated sought equitable relief in this action, and as to these contracts I conclude that Industrial is entitled to recover principal plus interest at six per cent.

M. Net discount of $18,612.16 having been retained by

Industrial under the 1956 master contract on contracts which were paid in full prior to the institution of this action, Associated is entitled to recover $37,224.32 on account of usury collected by Industrial on such contracts.

N. The check of Industrial in the amount of $19,493.50 charged against Associated's reserve account being for the purchase by Associated from Industrial of certain Best Sew-Vac contracts which were never received by Associated, from Industrial, Associated is entitled to a credit against Industrial in the sum of $19,493.50 on account of this transaction.

O. The $13,000.00 note executed by Associated to Industrial being for the purchase from Industrial of Best Sew-Vac contracts which were never received, the note is without consideration and Industrial is not entitled to recover thereon.

P. Industrial having in its possession at the time of the hearing in this cause 666 repossessed machines worth a fair market value of $30.00 each, Associated is entitled to a credit against Industrial, on account of said machines, in the amount of $19,980.00.

Q. The $359,810.03 outstanding on December 17, 1957, includes discount of 11 per cent collected in advance. I find that Industrial is entitled to collect discount in advance, but only at the rate of 6 per cent per annum. Since the gross balance of contracts in the amount of $359,810.03 as of December 17, 1957, includes discount in excess of 6 per cent in the amount of $16,207.66 I conclude that Industrial is entitled to recover the sum of $343,602.37 representing principal plus discount at the rate of 6 per cent.

R. Since the $359,810.03 outstanding on December 17, 1957 includes some contracts on which discount has been collected in advance until at least December 2, 1958, and since the sum of $359,810.03 represents $324,153.18 of principal plus discount, I conclude that Industrial is entitled to

recover interest on the sum of $324,153.18 from December 2, 1958 until paid.

S. At the time of the hearing, Industrial having 871 contracts which were still paying, an exact money judgment cannot be entered at this time. However, it is the conclusion of the Special Master that judgment should be entered to the following effect:

(1) That Industrial have and recover against Associated the following amounts:

(a) The sum of $343,602.37 without interest.

(b) Interest on the sum of $324,153.18 from December 2, 1958 until paid.

(2) That Associated have and recover against Industrial the following amounts:

(a) The sum of $44,155.50, representing the amount in the reserve account of Associated, with interest from December 18, 1957.

(b) The sum of $3,348.46, representing the amount held in Associated's special reserve account as of January 5, 1959, with interest from January 5, 1959.

(c) The sum of $19,980.00, representing the fair market value of 666 machines repossessed by Industrial and not sold at the time of this hearing, with interest from February 2, 1959.

(d) All amounts received by Industrial representing collections and sales of machines made by Industrial since December 17, 1957, with interest from the date of each such receipt.

(e) The sum of $19,493.50 representing the amount charged Associated's reserve account for the purchase of Best-Sew-Vac contracts which were never received by Associated, with interest from October 3, 1957.

(f) The sum of $54,184.62 representing the amount Associated is entitled to recover on account of usury paid on contracts transmitted to Industrial under the 1955 master contract, with interest from the date of the judgment.

(g) The sum of $37,224.32 representing the amount Associated is entitled to recover on account of usury paid on contracts transmitted to Industrial under the 1956 master contract and paid in full prior to the institution of this action, with interest from the date of the judgment.

3. Upon payment by Associated to Industrial of such amounts as are due it under the preceding paragraphs, Associated is entitled to have re-transferred to it, simultaneously, all contracts transmitted to Industrial by it upon which any customers' balances remain outstanding.

This____day of October, 1960.

Special Master

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

Civil No. 1089

ASSOCIATED STORES, INC., PLAINTIFF

vs.

INDUSTRIAL LOAN AND INVESTMENT COMPANY, DEFENDANT

CIVIL ACTION IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. J. B. CRAVEN, JR., DISTRICT JUDGE, ON ASSIGNMENT FROM THE WESTERN DISTRICT OF NORTH CAROLINA.

(Argued December 11, 1961. Decided January 9, 1962.)

Before J. B. CRAVEN, JR., District Judge.

J. C. B. Ehringhaus, Jr., for Plaintiff; and Howard E. Manning for Defendant.

CRAVEN, District Judge:

This is a civil action heard on objections to Conclusions of law found by Mr. Charles Young of the Raleigh Bar, serving as Special Master. That he did so with pain. aking care and fairness appears from the fact that neither party to this action filed objections to his Findings of Fact. At the hearing no dissatisfaction with the Findings of Fact was indicated to the Court. Pursuant to Rule 53 (e) the Court thereupon accepts the Master's Findings of Fact (they comprise 35 typed pages) and adopts each and every one of them verbatim and as fully and completely as if set out herein.

This is a difficult and complex law suit. The Special Master conducted hearings extending over 25 days. The record of testimony came to 2,250 pages.

Briefly, the Findings of Fact of the Special Master tend to show that plaintiff, Associated Stores, Inc. (hereinafter called "Associated") was engaged in the business of selling on instaliment sale contracts vacuum cleaners and sewing machines and in order to prosecute its business needed to borrow substantial sums of money from time to time. Defendant, Industrial Loan and Investment Company (hereinafter called "Industrial") agreed to provide to Associated monies from time to time by means of purchasing from Associated conditional sales contracts at a discount. The discount was usually 11 per cent. The parties dealt with each other from sometime in 1955 until December, 1957 and operated under 2 contracts referred to in the Findings of Fact as the master contract of January, 1955 and the master contract of May, 1956.

Although the form of the transaction was that of purchase and sale of individual conditional sale contracts, in one or the other of the written contracts or in the endorsement of each conditional sales contract Associated guaranteed the payment of the principal amount due to Industrial. The dispute and indeed the result turns upon this critical factor.

I. In the transactions between Associated and Industrial are the elements of usury present?

Industrial strenuously contends that the transactions between Industrial and Associated were purchases and sales at discounts rather than loans. Giving to these transactions a name does not necessarily resolve the problem. It is common knowledge that the method of financing used in this case is referred to by financially sophisticated people as the discounting of commercial paper. In the opinion of the Court the finding of the Special Master that both parties regarded the transactions as sales of conditional con-

tracts at a discount and the failure to find that either party regarded the transactions as being loan transactions is not of controlling importance to a determination of the ultimate question. That question is simply whether or not the Usury law of North Carolina applies to these transactions.

> "It has been repeatedly held, in this State, that while one may buy a note from another, at any price that may be agreed upon, the bargain being free from fraud or unlawful imposition, if the purchaser requires the endorsement of the seller as a guaranty of payment, the transaction, as between the immediate parties thereto, is in effect a loan, and will be so considered, within the meaning and purport of our laws against usury." *Bynum v. Rogers,* 49 N.C., 399; *Ballinger v. Edwards,* 39 N.C., 449; *McElwes v. Collins,* 20 N.C., 209; *Sedbury v. Duffy,* 158 N.C., 362.

> "A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may assume." *Doster v. English,* 152 N.C., 325; *Monk v. Goldstein,* 172 N.C., 566.

It is a half-truth to call the transactions between Associated and Industrial "sales at a discount." Note the arrangements of paragraphs in *Corpus Juris Secundum*: under Usury #19 the title appears "Purchase of Choses in Action at Discount." A subordinate paragraph is entitled "Effect of Endorsement or Other Guaranty." The editors then point our that the authorities present some 4 different views of the effect of endorsement or guaranty. North Carolina is annotated as one of the jurisdictions holding such a transaction usurious, citing *Bynum v. Rogers,* 49 N.C., 399.

The only decision within North Carolina that has come to my attention that is *Contra* is *In Re Eby,* 39 F.(2nd) 76.

This is a memorandum decision in which the District Judge reversed the Findings of Fact and Conclusions of Law of a Special Master without citation of authority (except for 2 cases arising in other jurisdictions). The Conclusions of Law and the reasoning of the Special Master are contained in the decision, with citations of authority, and are more persuasive to me than is the opinion of the District Judge.

A rose is a rose is a rose, and smells the same by any other name. The parties contemplated and contracted that in all events Industrial was to get back all of its monies advanced plus approximately 11 per cent. This invokes the application of the Usury law of North Carolina — if other essential elements are present. The shorthand way of expressing this conclusion is to call it a loan transaction, which conclusion of law I adopt and confirm.

Having decided that (1) there was a loan of money with (2) an understanding that principal shall be repayable absolutely, it remains to consider whether or not there was (3) a greater profit than is permitted by law paid or agreed to be paid, and (4) whether the contract was entered into with an intention to violate the law. These elements together constitute usury. *Ector v. Osborne*, 179 N.C., 667.

The last ingredient, sometimes referred to as "corrupt intent" is simply the intentional charging more for money lent than the law allows. *Riley v. Sears*, 154 N.C., 402. The provision contained in each master contract for 11 per cent discount is a revelation of purpose to exact a greater profit than allowed by law on the face of the instrument.

> "The corrupt intent mentioned in the books consists in the charging or receiving the excessive interest with the knowledge that it is prohibited by law and the purpose to violate it. Our statute makes it usury if the interest is *knowingly* charged or received at the unlawful rate." *Ector v. Osborne*, 179 N.C., 667; *MacRacken v. Bank*, 164, N.C., 19.

Industrial contends that it cannot be charged with the intention of exacting a greater profit than allowed by law from Associated because it expected to get its excess profit from the original obligors on the conditional sales contract. It is a bit hard to square this argument with the fact that Industrial saw fit to require Associated to guarantee payments of the conditional sales contract obligors. However that may be, in my opinion under the facts of this case payment by conditional sales contract obligors constituted payment by Industrial for purpose of the application of the usury law. The Courts do not distinguish between direct and indirect payments. 91 C. J. S. "Usury" #28 (c) note 41. I believe that the Special Master rightly concluded that the 4 elements of usury existed in this case.

II. To what transactions between Industrial and Associated do the penalties for usury apply?

Industrial strenuously urges that its liability to Associated was secondary to the primary liability of each customer of Associated who executed a conditional sales contract and that Associated's obligation on each conditional sales contract was a contingent liability, i. e., to pay Industrial only if the makers of the note did not pay and that the Usury law would in no event apply to payments made by the customers. In my opinion this argument lacks validity for the reason that it fails to give effect to the overall agreement and obligation of Associated (as contained in both master contracts) to guarantee the payment of principal to Industrial absolutely. This argument is simply a restatement of the one already discussed *supra.*

When the plaintiff initiated this action it sought equitable relief and obtained a temporary restraining order from the Judge of the Superior Court. This order restrained and enjoined the defendant from collecting payments due the defendant by any of the plaintiff's customers. The order remained in force from December 18 until disolved by order of Judge Gilliam on February 4, 1958, during which time

the plaintiff collected some $16,000.00, none of which has been turned over to Industrial.

Does this equitable relief mitigate the stringency of the Usury law?

> "The principle is well settled by numerous decisions of this Court that where a debtor seeks the aid of the court of equity on the ground that his debt is tainted with usury he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury." *Smith v. Bryant*, 209 N.C., 213; *Bailey v. Inman*, 224 N.C., 571; *Owens v. Wright*, 161 N.C., 102. In *Waters v. Garris*, 188 N.C., 305, the Court said "plaintiffs are not entitled . . . to penalties . . . for . . . usurious interest *and* (italics Mine) to injunctive relief. Having come into a court of equity, they must do equity before they can ask its aid; and what constitutes doing equity in a case where usurious interest has been reserved, or paid in advance, is payment of the principal debt less the usurious excess of interest paid. If the contract for usurious interest be executory, the sum equitably due is the principal debt with legal interest thereon."

It must be admitted that the decisions establishing this rule of equity are factually dissimilar. Usually the debtor has sought to restrain foreclosure on property he has mortgaged to secure the debt. Here the debtor sought to restrain collection on accounts which, in effect, may be said to have been assigned to secure the debt. The difference to me does not seem to be so great as to call for the application of the equitable rule in the mortgage case and the denial of it in this one.

The equitable exception to the harshness of the usury

penalty[1] was the result of an attempt to reach a just result without doing more violence than necessary to early statutory law. But history aside, it is now well settled that one seeking equitable relief from a usurious contract must, as a condition thereof, do everything that equity requires. 55 *Am Jur "Usury"* #108. In most jurisdictions, equitable relief against a usurious contract is granted only upon the condition that the debtor shall pay, or offer to pay, the principal of his debt and legal interest thereon. *Ibid.*

The Special Master concluded in effect that Associated is entitled to recover double the amount of interest charged on fully paid up contracts because no equitable relief was sought as to such contracts and that Associated must pay principal and the legal rate of interest as to most of the transactions coming under the second master contract because it sought equitable relief with respect to those transactions. In my opinion the Conclusions of law by the Special Master as to this aspect of the case are sound and ought to be confirmed.

The plaintiff contends that Findings of Fact numbered 53 and 54 support and require a conclusion of law that any liability or obligation of Associated to Industrial was paid and satisfied in full with respect to any balance outstanding on any contract the collection upon which was awarded to Industrial by the order of Judge Gilliam dated February 4, 1958. This amounts to simply an argument that because Judge Gilliam saw fit to allow Industrial to administer directly an attempt to collect on the conditional sales contracts assigned it that the effect of Judge Gilliam's order is to substitute for the right to receive payment the right instead to collect and attempt to collect from the original obligors. In my opinion this contention lacks merit and is supported by nothing contained in Judge Gilliam's order dated February 4, 1958. I know of no rule of law that Industrial's right to look to Associated excluded its right to ask the Court for

[1]Under former statutory law there resulted a forfeiture of principal as well as interest.

permission to attempt direct collection from obligors on conditional sales contracts. In my opinion no estoppel arises on the Findings of Fact nor on the face of the order of Judge Gilliam dated February 4, 1958.

To be sure Industrial had a duty to exercise reasonable diligence in attempting to collect upon individual customer contracts so as to mitigate and diminish its claims against Associated. I do not construe the Findings of Fact to require a conclusion of law that Industrial failed to perform this duty, and I overrule Associated's objection to the failure of the Special Master to so find.

Since all contracts under the first master contract were paid in full before the institution of this action and no equitable relief was sought by Associated as to them, I conclude that Associated is entitled to recover from Industrial twice the amount retained by Industrial as "discount" on contracts purchased under the January, 1955 master contract which amounts to $54,184.62.

Some of the contracts transmitted to Industrial under the second master contract have been paid in full and as to them I conclude that Associated is entitled to recover twice the amount of the net discount retained which amounts to $37,224.32.

Since Associated sought and obtained equitable relief with respect to contracts which had not been fully paid I conclude that Industrial is entitled to recover the principal amount of such outstanding accounts plus interest at the rate of 6 per cent which amounts as of December 17, 1957 to the sum of $343,602.37. I further conclude that Industrial is entitled to recover interest on the principal balance of $324,153.18 from December 2, 1958 until paid for the reasons set forth in the Special Master's Findings of Fact and Conclusions of Law.

At the time of the filing of the referee's report (October 13, 1960) there were 871 contracts on which the obligors

were still paying Industrial. Before a final money Judgment can be entered a further accounting must be had of these contracts. Other adjustments between the parties must be made as contained in the Special Master's Conclusions of Law.

The Court overrules each and every objection of the parties to the Conclusions of Law and adopts and confirms each and every one of the Conclusions of Law of the Special Master and directs the Clerk to enter judgment pursuant to Conclusion of Law "S" to effect the following:

"(1) That Industrial have and recover against Associated the following amounts:

(a) The sum of $343,602.37 without interest.

(b) Interest on the sum of $324,153.18 from December 2, 1958 until paid.

"(2) That Associated have and recover against Industrial the following amounts:

(a) The sum of $44,155.50, representing the amount in the reserve account of Associated, with interest from December 18, 1957.

(b) The sum of $3,348.46, representing the amount held in Associated's special reserve account as of January 5, 1959, with interest from January 5, 1959.

(c) The sum of $19,980.00, representing the fair market value of 666 machines repossessed by Industrial and not sold at the time of this hearing, with interest from February 2, 1959.

(d) All amounts received by Industrial representing collections and sales of machines made by Industrial since December 17, 1957, with interest from the date of each such receipt.

(e) The sum of $19,493.50 representing the amount charged Associated's reserve account for the purchase of the Best Sew-Vac contracts which were never received by Associated, with interest from October 3, 1957.

(f) The sum of $54,184.62 representing the amount Associated is entitled to recover on account of usury paid on contracts transmitted to Industrial under the 1955 master contract, with interest from the date of the judgment.

(g) The sum of $37,224.32 representing the amount Associated is entitled to recover on account of usury paid on contracts transmitted to Industrial under the 1956 master contract and paid in full prior to the institution of this action, with interest from the date of the judgment.

"(3) Upon payment by Associated to Industrial of such amounts as are due it under the preceding paragraph, Associated is entitled to have re-transferred to it, simultaneously, all contracts transmitted to Industrial by it upon which any customers' balances remain outstanding."

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 1089

ASSOCIATED STORES, INC., PLAINTIFF

vs.

INDUSTRIAL LOAN AND INVESTMENT COMPANY, DEFENDANT

Final Judgment

This cause coming on to be heard before Honorable J. B. Craven, Jr., United States District Judge, for entry of a

final judgment in conformity with the decision of the United States Court of Appeals for the Fourth Circuit, No. 8804, filed January 7, 1963, remanding this cause to the District Court of the United States for the Eastern District of North Carolina for entry of a final judgment, and for that purpose the Court makes the following FINDINGS OF FACT:

1. That the defendant, Industrial Loan and Investment Company, is entitled to recover of the plaintiff, Associated Stores, Inc., the sum of THREE HUNDRED FORTY THREE THOUSAND SIX HUNDRED TWO AND 37/100 ($343,602.37) DOLLARS, with interest on the sum of THREE HUNDRED TWENTY FOUR THOUSAND ONE HUNDRED FIFTY THREE AND 18/100 ($324,153.18) DOLLARS of said amount at the rate of six (6%) per cent per annum from December 2, 1958.

2. That the plaintiff, Associated Stores, Inc., is entitled to recover of the defendant, Industrial Loan and Investment Company, the following amounts with interest at the rate of six (6%) per cent per annum from the dates set out after each amount:

(a) FORTY FOUR THOUSAND ONE HUNDRED FIFTY FIVE AND 50/100 ($44,155.50) DOLLARS, with interest from December 18, 1958.

(b) THREE THOUSAND THREE HUNDRED FORTY EIGHT AND 46/100 ($3,348.16) DOLLARS, with interest from January 5, 1959.

(c) NINETEEN THOUSAND NINE HUNDRED EIGHTY AND NO/100 ($19,980.00) DOLLARS, with interest from February 2, 1959.

(d) ONE HUNDRED SIXTY TWO THOUSAND THREE HUNDRED THIRTY AND 38/100 ($162,330.38) DOLLARS, said sum being the total amount collected by Industrial Loan and Investment Company between

December 1, 1957 and July 1, 1963, on conditional sales contracts held by it, together with interest thereon in the sum of FORTY EIGHT THOUSAND FIVE HUNDRED THIRTY NINE AND 62/100 ($48,539.62) DOLLARS, calculated to July 8, 1963, and interest on ONE HUNDRED SIXTY TWO THOUSAND THREE HUNDRED THIRTY AND 38/100 ($162,330.38) DOLLARS, from July 8, 1963.

(e) NINETEEN THOUSAND FOUR HUNDRED NINETY THREE AND 50/100 ($19,493.50) DOLLARS, with interest from October 3, 1957.

(f) FIFTY FOUR THOUSAND ONE HUNDRED EIGHTY FOUR AND 62/100 ($54,184.62) DOLLARS, penalty for usury under First Contract.

(g) THIRTY SEVEN THOUSAND TWO HUNDRED TWENTY FOUR AND 32/100 ($37,224.32) DOLLARS, penalty for usury under Second Contract.

3. That, after computing the respective recoveries of the parties with the interest thereon as set out in FINDINGS OF FACT 1 and 2, the defendant, Industrial Loan and Investment Company, is entitled to recover of the plaintiff, Associated Stores, Inc., the sum of $16,496.95, as of the date of this judgment.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED and DECREED that the defendant, Industrial Loan and Investment Company, have and recover of the plaintiff, Associated Stores, Inc., the sum of $16,496.95, with interest thereon at the rate of six (6%) per cent per annum from the date of this judgment.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that upon payment by Associated Stores, Inc. to Industrial Loan and Investment Company of the sum of $16,496.95, with interest at the rate of six (6%) per cent per annum from the date of this judgment, Industrial Loan and Investment Company will retransfer to Associated Stores, Inc., simultaneously with such payment, all conditional sales

contracts transmitted to Industrial Loan and Investment Company by Associated Stores, Inc., upon which any customer's balances remain outstanding.

Costs in this civil action, exclusive of allowances to the Special Master, are taxed equally against the plaintiff and the defendant.

This the 9th day of July, 1963.

J. B. CRAVEN, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9222.

Associated Stores, Inc.,
Appellant and Cross-Appellee,

versus

Industrial Loan and Investment Company,
Appellee and Cross-Appellant.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH. J. B. CRAVEN, JR., DISTRICT JUDGE.

(Argued January 21, 1964. Decided January 24, 1964.)

Before HAYNSWORTH and BOREMAN, Circuit Judges, and MICHIE, District Judge.

J. C. B. Ehringhaus, Jr., for Appellant and Cross-Appellee, and Howard E. Manning (Manning, Fulton, Skinner & Hunter on brief) for Appellee and Cross-Appellant.

PER CURIAM:

For the reasons stated by the District Court in its opinion, the judgment below is affirmed. Associated Stores, Inc. v. Industrial Loan & Invest. Co., D.C.E.D.N.C., 202 F. Supp. 251.

Affirmed.

Office-Supreme Court, U.S.
FILED
JUL 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 208

ASSOCIATED STORES, INC.,
Petitioner

v.

INDUSTRIAL LOAN AND INVESTMENT COMPANY
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

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IN THE

Supreme Court of the United States

No. 208

ASSOCIATED STORES, INC.,
Petitioner

v.

INDUSTRIAL LOAN AND INVESTMENT COMPANY
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OBJECTIONS TO JURISDICTIONAL GROUNDS

The respondent contends there are no special and important reasons for a review on writ of certiorari under Supreme Court Rule 19 in this case. Pertaining to the points in this petition, the decision of the Court of Appeals for the Fourth Circuit in affirming the judgment below is not in conflict with decisions of other Courts of Appeals, as this is a diversity action calling only for the construction of a North Carolina statute. The decision is not in conflict with applicable and controlling state decisions. Furthermore, a change in the applicable statutory law after this action was begun, which does not apply to this action, has rendered the petitioner's second question a matter of concern

only between the petitioner and respondent and the question is no longer a matter of public concern.

Counsel for petitioner fully and freely agreed for the case to be heard in the absence of Judge Haynsworth, after being apprised that if either counsel objected to the absence of Judge Haynsworth, the arguments would be rescheduled for hearing at a later date. The Court of Appeals for the Fourth Circuit did not depart from the accepted and usual course of judicial proceedings in its handling of this matter.

STATUTES

"G. S. 24-2. Penalty for usury; corporate bonds may be sold before par. The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. If security has been given for an usurious loan and the debtor or other person having an interest in the security seeks relief against the enforcement of the security or seeks any other affirmative relief, the debtor or other person having an interest in the security shall not be required to pay or to offer to pay the principal plus legal interest as a condition to ob-

taining the relief sought but shall be entitled to the advantages provided in this section. Nothing contained in this section or in Sec. 24-1, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof: nor shall anything contained in this section or in Sub-Sec. 24-1 and 24-3 be held or construed to prohibit private corporations from making contracts, incurring liabilities, borrowing money and paying a charge therefor not exceeding six per centum (6%) of the original amount of the loan for each twelve (12) months of the duration of the same, notwithstanding that such loan is payable in installments. (1876-7, c. 91; Code, S.3836; 1895, c. 69; 1903, c. 154; Rev., s. 1951; C. S., s. 2306; 1955, c. 1196; 1959, c. 110.)"

Found in General Statutes of North Carolina, Vol. 1C, 1963 Cumulative Pocket Supplement, page 286.

The fourth sentence of this statute was inserted in 1959 by 1959 Session Laws, Chapter 110, page 90, which reads as follows:

"AN ACT TO AMEND G. S. 24-2 SO AS TO MAKE ITS PROVISIONS APPLY WHERE A DEBTOR OR OTHER PERSON SEEKS EQUITABLE RELIEF.

"The General Assembly of North Carolina do enact:

"SECTION 1. G. S. 24-2 is hereby amended by inserting immediately following the third sentence thereof the following new sentence:

'If security has been given for an usurious loan and the debtor or other person having an interest in the security seeks relief against the enforcement of the security or seeks any other affirmative relief, the debtor or other person having an interest in the security shall

not be required to pay or to offer to pay the principal plus legal interest as a condition to obtaining the relief sought but shall be entitled to the advantages provided in this Section.'

"SECTION 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

"SECTION 3. This Act shall become effective July 1, 1959.

"In the General Assembly read three times and ratified, this the 24th day of March, 1959."

STATEMENT OF CASE

This action was begun by petitioner against respondent under N. C. G. S. 24-2 in December, 1957, in the Superior Court of Wake County, North Carolina and was removed by respondent to the United States District Court for the Eastern District of North Carolina on the ground of diversity of citizenship and the amount involved under 28 U.S.C.A. 1332.

Petitioner and respondent had entered into two contracts referred to as the "1955 Master Contract" (Report of Special Master, paragraph 7, Petitioner's Appendix, pages 4-7) and the "1956 Master Contract", (Report of Special Master, paragraph 19, Petitioner's Appendix, pages 9-13). Petitioner was in the business of selling sewing machines on time prices secured by conditional sales contracts. Under the above Master Contracts the petitioner discounted and assigned to respondent these contracts at eleven (11%) per cent discount, with petitioner guaranteeing payment of the assigned conditional sales contracts. These transactions, because of the guaranty of payment, were held to be loans by the District Court and the Court of Appeals for the Fourth Circuit.

The points in this petition for writ of certiorari deal only with conditional sales contracts outstanding at the institution of the action and as all conditional sales contracts assigned under the "1955 Master Contract" had been paid, we are concerned only with the "1956 Master Contract". As to the assigned contracts that had been paid, petitioner secured in this action the exact relief he sought, to wit, twice the amount of interest paid.

Petitioner, upon institution of the action, asked that the respondent be restrained from collecting from the makers of the conditional sales contracts assigned to respondent and that respondent be required to forfeit all interest outstanding as the rate was usurious. The restraining order was allowed by the Wake County Superior Court on December 18, 1957. Report of Special Master, paragraph 52, Petitioner's Appendix, page 21. The restraining order was returnable on January 5, 1958, but since the action was removed to the United States District Court for the Eastern District of North Carolina by reason of diversity and the amount involved, the return order was heard on January 6, 1958, by United States District Judge Don Gilliam. By order of February 4, 1958, Judge Gilliam dissolved the restraining order of the Wake County Superior Court and awarded collections to the respondent until further order of the Court. Report of Special Master, paragraph 53, Petitioner's Appendix, page 23.

As to the points in this petition, the District Court held that Judge Gilliam's order allowing the respondent to make collections until further order of the Court did not relieve petitioner of its obligation to the respondent for any uncollectible balance due on the outstanding conditional sales contracts and that petitioner by seeking equitable relief to have the usurious element of his debt eliminated must do equity and pay the principal plus interest at the legal rate of six (6%) per cent under the applicable decisions of North Carolina. The decision of the District Court was affirmed by the Court of Appeals for the Fourth Circuit.

ARGUMENT

The petitioner states as a reason for review on writ of certiorari that the decision is in conflict with decisions of other Courts of Appeal. As stated above, this action was instituted in the Wake County, North Carolina Superior Court under North Carolina General Statutes 24-2 and was removed to the United States District Court for the Eastern District of North Carolina by the respondent on the grounds of diversity of citizenship and the amount involved. The legal question involved is a construction of G. S. 24-2 and the North Carolina decisions construing this statute. There are no decisions of other Courts of Appeal construing the North Carolina statute so there can be no conflict of decisions between Courts of Appeal as argued by petitioner. Petitioner in its brief cites only one case from another Court of Appeals, that being *Chandler v. McKerral*, 68 F. 2d 343, (9th C.C.A. 1934) cited at page 8. The *Chandler* case deals with the fraudulent sale of stock by a corporation and does not in any way involve usury or G. S. 24-2, and the decisions of the North Carolina Supreme Court.

FIRST QUESTION

The petitioner poses the following question:

Did the Court below err in failing to hold that any liability or obligation of petitioner to respondent was paid, satisfied or discharged in full with respect to any balance outstanding on any conditional sales contracts, the collection upon which was awarded to respondent by order of Gilliam, District Judge, dated February 4, 1958?

The petitioner purports to make two points in support of its position:

1. That any liability or obligation of petitioner to respondent was paid, satisfied or discharged by the order entered by Judge Gilliam on February 4, 1958.

2. That the efforts of respondent in making collections pursuant to said order of Judge Gilliam were so inadequate as to relieve petitioner of liability as guarantor on the outstanding contracts which it was collecting pursuant to Judge Gilliam's order, and that the Special Master should have so found.

The petitioner instituted this action and requested, among other relief that the complaint be treated as an affidavit and petition for equitable relief, that the court issue a temporary restraining order enjoining the respondent from securing the payment of the balances due by makers of conditional sales contracts; that upon the show-cause hearing, the temporary injunction be continued until the trial at which time the petitioner would pray that the temporary restraining order be made permanent.

The Honorable William Y. Bickett, Judge of the Superior Court of Wake County, upon the complaint, issued a temporary restraining order and directed the respondent to appear on January 5, 1958, to show cause, if any it had, why the order should not be continued until the trial of the case on its merits. The case was removed to the United States District Court and this hearing was held by Gilliam, District Judge. Judge Gilliam in his order entered on February 4, 1958, dismissed the temporary restraining order against the respondent and directed that the respondent proceed with the collection of the payments on the conditional sales contracts held by it. Judge Gilliam made no decision as to the final rights of the parties and made the following entry:

> "4. That this order is effective as of the opening of business February 5, 1958, and only until the further orders of the Court and the findings herein are based upon prima facie conclusions only." Petitioner's Appendix page 27.

As stated above the law of the case is that the discounting of the conditional sales contracts with a guaranty constitutes

a series of loans, the guaranty being the controlling factor in the decision. The transactions being loans, the assignment of the conditional sales contracts simply created security for the loans. Petitioner in asserting that Judge Gilliam's order allowing respondent to make collections from the makers of the conditional sales contracts relieved petitioner of its obligation on its guaranty of payment of the conditional sales contracts misses the whole point. Petitioner attempts to assert the principle of equitable estoppel in that respondent in asking to make collection after petitioner had restrained respondent from doing so and then seeking to recover the balance due on uncollectible conditional sales contracts took inconsistent positions. Respondent submits that the only inconsistent position taken in this action is that of the petitioner in relying upon the guaranty of payment to convert the transactions into loans and now asserting the order allowing respondent to collect directly from the makers of the conditional sales contract relieves it of its obligation on the guaranty.

In addition, the Court's attention is directed to the right given to the respondent by the petitioner in paragraph 15 of the 1956 Master Contract, Report of Special Master, paragraph 19, Petitioner's Appendix, page 12, which reads as follows:

> "15. First Party, may, at its option, should it appear advisable to it, and in order to protect its interest in the money advanced by it; in case of financial difficulties or otherwise of said Second Party, notify all contract obligors to remit direct to it, the unpaid balances of any and all contracts held by said First Party."

In short, petitioner's contention is that if a secured creditor collects on the security he is barred from collecting any deficiency from the debtor, which is obviously without merit. The Court's attention is invited to the rules of law laid down in the following two cases: *Rierson v. Hanson*, 211 N. C. 203,

189 S. E. 502 (1936) where the "Bankruptcy Rule" was applied, held a creditor having collateral security is allowed to prove the balance of his claim only after exhausting the collateral security. *Bank v. Jarrett,* 195 N.C. 798, 143 S.E. 827 (1928) where the "Chancery Rule" was applied, held a secured creditor could share in the general fund before resorting to the security. Regardless of which rule is applied, neither prevents the creditor from recovering a deficiency from the debtor. The attention of the Court is invited to Judge Craven's opinion on this point in Petitioner's Appendix, page 50.

The petitioner further contends that efforts of the defendant in making collections pursuant to the order of Judge Gilliam were so inadequate as to relieve the plaintiff of liability as guarantor on the outstanding contracts which it was collecting pursuant to Judge Gilliam's order, and that the Special Master should have so found. Judge Craven said on this point,

> "To be sure Industrial had a duty to exercise reasonable diligence in attempting to collect upon individual customer contracts so as to mitigate and diminish its claim against Associated. I do not construe the Findings of Fact to require a conclusion of law that Industrial failed to perform this duty, and I overrule Associated's objection to the failure of the Special Master to so find."
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> *Associated Stores, Inc. v. Industrial Loan and Investment Company,* 202 F. Supp. 251 (1962). Petitioner's Appendix, page 51.

This conclusion is well supported by the evidence and is a determination of fact rather than law.

SECOND QUESTION

The petitioner poses as its second question the following:

Did the Court below err in determining that petitioner had sought equitable relief in such fashion as to mitigate the effect

of the North Carolina usury law (G. S. 24-2) as applied to a portion of the unlawful interest exacted of petitioner by respondent?

As pointed out previously in this brief, petitioner upon the institution of this action, sought and received a temporary restraining order against respondent, thus invoking the equitable jurisdiction of the Court. When the cause came on to be heard upon the return date of the order, the restraining order was dissolved. The attention of the Court is invited to the fact that this point applies only to the outstanding conditional sales contracts at the date the action was instituted. It in no way concerns the conditional sales contracts that had been paid in full or any interest paid on those contracts. Thus the only provision of the North Carolina usury law (G. S, 24-2) that is before the Court on this point is the provision relating to forfeiture of all interest if the rate is usurious.

Respondent submits that the law of North Carolina, discussed below, at the time this action was instituted, clearly sets forth that a debtor who goes into court seeking equitable relief from an executory contract that he claims is usurious must as a condition of relief pay the principal plus the legal rate of interest under the principle that "he who seeks equity must do equity". The Special Master, the District Court, and the Court of Appeals for the Fourth Circuit, so found the law to be, and held that petitioner, as a debtor who had sought equitable relief as to the debt, must first pay the principal and the legal rate of interest before being entitled to any relief as to any indebtedness arising from any outstanding conditional sales contract.

The law that a debtor who seeks to restrain the collection of an usurious debt on an executory contract is not entitled to a complete forfeiture of all the interest but must pay the principal plus the legal rate of interest is clearly set forth in the landmark case of *Waters vs. Garris*, 188 N.C. 305, 124 S.E. 334 (1924):

"It is the established law of this jurisdiction that when a debtor, who has given a mortgage to secure the payment of a loan, comes into equity, seeking to restrain a threatened foreclosure under the power of sale in his mortgage, as a deliverance from the execution of usury, he will be granted relief and allowed to have the usurious charges eliminated from his debt only upon paying or tendering the principal sum with interest at the legal rate, the only forfeiture which he may thus enforce being the excess of the legal rate of interest. *Corey vs. Hooker*, 171 N.C. 229; *Owens vs. Wright*, 161 N.C. 127. This ruling which has been established by an unbroken line of precedents, beginning with *Taylor vs. Smith*, 9 N.C. 465, and running through a multitude of cases down to our latest decision in *Adams vs. Bank*, 187 N.C. 343, is based upon the principle that he who seeks equity must do equity. It is a well recognized rule of equity jurisprudence that one, who seeks the aid of a court of equity to be relieved from usury, must do equity by paying or offering to pay the principal sum borrowed, with lawful interest thereon, as a condition precedent to the granting of the relief sought. 39 Cyc., 1010.

"The following clear and succinct statement of the doctrine is taken from 27 R.C.L., 264: 'It is well settled, in the absence of statutes to the contrary, that one seeking relief in a court of equity from a usurious contract must, as a condition of relief, do everything that equity requires, and if a borrower goes into a court of equity, in respect to a security given in connection with usurious contracts, or to avoid extortion or oppression, the court will compel him to pay principal and legal interest if the contract is executory, because there is moral obligation resting on him to do so, and it is equitable that he should be compelled to do it. The rule of course rests on the maxim that 'he who seeks equity must do equity'."

In *Bailey v. Inman*, 224 N.C. 571, 31 S.E. 2d 769 (1944) the Court said:

> "The principle is well settled by numerous decisions of this Court that where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury. Connor, J., in *Smith v. Bryant*, 209 N.C., 213, 183 S.E., 276. See also *Waters v. Garris*, 188 N.C., 305, 124 S.E., 334; *Miller v. Dunn*, 188 N.C. 397, 124 S.E., 746; *Jonas v. Mortgage Co.*, 205 N.C., 89, 170 S.E., 127; *Mortgage Co. v. Wilson*, 205 N.C., 493, 171 S.E., 783; *Kenny v. Hotel Co.*, 208 N.C., 295, 180 S.E., 697; *Buchanan v. Mortgage Co.*, 213 N.C., 247, 195 S.E., 787."

For a collection of the cases see Annotations in 135 A.L.R. 808 (1941) and 166 A.L.R. 459 (1947).

While the North Carolina Supreme Court has expressed some concern with this rule of law, the Court has nevertheless recognized and applied it where the debtor seeks equitable relief.

Smith v. Bryant, 209 N.C. 213, 183 S.E. 276 (1935).

Indeed, the rule was so imbedded in the law of North Carolina by the cases at the time this action was instituted, the General Assembly in 1959 enacted an amendment to G. S. 24-2 in order to change it. (1959 Session Laws, Chapter 110, *supra*, page 3.)

This amendment which became effective July 1, 1959, while not applicable to this action, renders this question a matter of concern only to the parties to this action and it is no longer a matter of public importance. In *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880, 75 Sup. Ct. 122, 99 L.Ed. 693

(1954), Writ of Certiorari was issued to the Supreme Court of Iowa. Petitioner there had sought damages to compensate her for mental suffering claimed to flow from defendant cemetery's refusal to bury her husband, a Winnebago Indian, because the contract of sale of the burial lot provided that "burial privileges accrue only to members of the Caucasian race." On petition for rehearing in 349 U.S. 70, 75 Sup. Ct. 614, 99 L. Ed. 897 (1955) the Writ of Certiorari was dismissed when the Court discovered that after commencement of the action, Iowa enacted a statute which prohibited cemeteries from denying burial on account of race or color, declared racial restrictive covenants in burial contracts void, and by implication, allowed an injured party to recover damages in a civil action based on a violation of the statute. Justice Frankfurter speaking for the majority said at 349 U.S. 76, 99 L.Ed. 902:

> "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance."

and at 349 U.S. 79, 99 L.Ed. 904,

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

CONCLUSION

The respondent submits that this petition presents no special important reasons for a review on writ of certiorari.

Respectfully,

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